Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-542

TAMA MEAT PACKING CORP.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

The Petitioner Tama Meat Packing Corp., respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit rendered in this proceeding on May 12, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix submitted as part of this petition.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered July 5, 1978, enforcing an order of the National Labor Relations Board dated June 14, 1977. This petition for certiorari was filed within 90 days of entry of said Judgment by the Court of Appeals for the Eighth Circuit. This Court's Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether circumstantial evidence of an employer's anti-union motivation adduced in a previous and unrelated unfair labor practice proceeding is sufficient as the *sole* basis upon which to sustain the General Counsel's burden regarding an employer's motivation under the "comparatively slight" category of the Supreme Court's *Great Dane* Doctrine in a subsequent unfair labor practice proceeding?

(2) Whether a violation of National Labor Relations Act[1] Section 8(a)(3) may be sustained under the "comparatively slight" category of the *Great Dane* Doctrine where the employer presents credited evidence of the lawfulness of its motive and conduct, and the evidence of unlawful intent is derived *solely* from the findings of improper motive adduced in a previous and unrelated unfair labor practice proceeding?

(3) Can a record devoid of direct or circumstantial evidence of union animus support a finding of a Section 8(a)(3) violation under the substantial evidence requirement formulated in the Supreme Court's *Universal Camera* rule?

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[1] 29 U.S.C. §141 *et seq.*, hereinafter referred to as "The Act". 29 U.S.C. §158(a)(3) is hereinafter referred to as "Section 8(a)(3)".

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 158

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 157 of this title;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, . . .

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below

Trial of the unfair labor practice charges was heard November 16 and 17, 1976, and decided February 9, 1977. In his decision the Administrative Law Judge[2] found (a) the Company violated Section 8(a)(3) on or about July 19, 1976[3] by failing

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[2] For convenience, the Administrative Law Judge is hereinafter referred to as the "ALJ"; Petitioner is hereinafter referred to as the "Company" or "Petitioner"; Respondent National Labor Relations Board is hereinafter referred to as the "Board"; and the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-46 (charging party in the unfair labor practice proceedings upon which the Board's Order is based) is hereinafter referred to as the "Union". References to the Appendix are designated as "A" followed by the page number of the Appendix specifically referred to in this Petition.

[3] Hereinafter all dates refer to 1976 unless otherwise noted.

to offer Richard Thomas the opportunity to bid on a vacant job; and (b) the Company violated Section 8(a)(3) by suspending Thomas on July 19 and subsequently discharging him on July 22. The ALJ recommended to the Board the Company be ordered to offer Thomas reinstatement to his former job and to the position of backsaw operator, or, if those jobs no longer existed, to substantially equivalent positions, and to make Thomas whole for any loss of pay suffered by reason of his discharge (A.53-54). Thereafter, the Company filed timely exceptions to the ALJ's decision contending, *inter alia*, that he had made findings of fact and conclusions of law unsupported by record evidence and contrary to applicable Board and court decision.

On June 14, 1977, the Board issued its Decision and Order adopting *pro forma* the ALJ's rulings, finding and conclusions and adopting his recommended order without modification (A. 96-97).

Pursuant to Section 10(f) of the Act (29 U.S.C. §160), Petitioner sought review of the Board's order.[4] The Board filed a cross-application for enforcement of its order and enforcement was granted by the Court of Appeals in the judgment of July 5, 1978 herein petitioned for review.

II. STATEMENT OF THE FACTS

A. Background

The Union lost a Board-conducted representation election in December, 1975; however, the results of the election were set aside and another election directed by the Board in September, 1976. The Board's Order directing another election was

[4] The Board's Order is reported at 230 NLRB No. 24 (1977).

based on the August, 1976 decision and recommended order of an Administrative Law Judge in which she found the Company had violated Section 8(a)(1) of the Act in various respects including two written warnings given to Thomas in September and December, 1975. The recommended order was subsequently adopted *pro forma* by the Board in September, 1976, directing the Company to expunge the aforesaid warning notices from its personnel records (A.14).

It is undisputed that Thomas had been outspoken in his support of the Union prior to his discharge in July, 1976. In addition, Thomas testified on behalf of the Board's General Counsel against the Company at the prior May, 1976 unfair labor practice hearings (A.14-16).[5] At the time of his suspension and subsequent discharge in July, 1976, Thomas was employed on a production line under the overall supervision of Stanley Sasker, Jerry Jacobi and James Kesl.

B. The Backsaw Operator's Job

Prior to July, 1976, the backsaw operator job was held by two employees. Employee Darrell Davis, previously trained in the operation of the backsaw, frequently substituted on the backsaw when either regular operator was absent. On July 1 one of the backsaw operators gave notice he was quitting and, a bulletin board notice was posted to the effect that a backsaw operator's position was open for bids (A.23-24). Approximately twelve employees signed the notice indicating interest in the position. Of that number, employee Arden Vestal was the most senior bidder. Thomas and Davis also signed the notices with Thomas senior to Davis (A.24).

[5] This is not significant since the ALJ found no evidence the Company's subsequent actions toward Thomas were motivated by his prior Board testimony or other participation in Board proceedings (A.53).

On July 6, Vestal was assigned to the backsaw operator's job to work intermittently on a trial basis as he was periodically released from his regular job in the Cooler Department (A.24-25). Vestal subsequently decided he did not want the backsaw operator's job and on July 26 signed a written disqualification slip to that effect (A.25). However, the ALJ found that Vestal told his supervisor he did not want the backsaw operator's job on July 19, a full week before he signed the aforementioned disqualification slip (A.25). In his decision the ALJ credited the testimony of Thomas that employee Davis worked in the backsaw operator's job as early as July 16 or 19 (later July 16 **and** 19) (A.24).

The ALJ concluded the Company acted unlawfully by failing to offer Thomas an opportunity to bid on the vacant backsaw operator's job on July 19, 1976. The ALJ recommended the Board order the Company to offer Thomas the backsaw operator's position with back pay from that date (A.53-55).

C. **The Suspension and Subsequent Discharge of Richard Thomas**

On July 19, Supervisors Sasker and Jacobi took Thomas to the office of Plant Superintendent Donald Derham for a meeting with Derham and Robert Bristol, Director of Industrial Relations. At this meeting Thomas was informed he was being placed on indefinite suspension, but was not at that time given the reasons therefor (A.28-29). Over the next several days, Bristol conducted an investigation of one or more prior incidents involving Thomas. Based on facts uncovered during that investigation, the decision was made to discharge Thomas (A.29).

Thereafter, Supervisor Sasker sent Thomas a letter dated July 22, indicating Thomas was being discharged for serious misconduct (instigating a production slowdown, advising an employee to "go home sick" when the employee had told his supervisor he would remain, and Thomas' use of derogatory remarks to fellow employees) (A.29-30).

THE RUTLEDGE INCIDENT

On July 16, employee Mark Rutledge was working on the production line (where freshly-killed cattle are dismembered as they proceed down the line) when the automatic feeder switch failed causing a "hole" in the line (an interruption in the flow of carcasses to waiting production employees farther down the line) (A.32-33). Since all employees on the floor are obligated to manually pull dead cattle through when the switch malfunctions, Rutledge pushed two or three carcasses past the broken switch. Thomas thereafter told Rutledge to discontinue manually pulling the carcasses through.

The ALJ found "Thomas' statement to Mark Rutledge had a tendency to interfere with production and thus was a *most serious matter under any interpretation*, and notwithstanding any union animus which Respondent may have directed toward Thomas" [Emphasis supplied] (A.38). Despite this finding, the ALJ found the Company engaged in disparate treatment of Thomas by failure to discipline employees John Hoffa and Roger Boldt for allegedly similar statements they made to Supervisors Jacobi and Kesl during that same week.[6] The ALJ rejected the Company's argument that the supervisory status of Jacobi and Kesl made the Rutledge incident legally distinguishable from the Hoff-Boldt incidents (A.39-40).

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[6] The ALJ understood the Hoffa-Boldt statements to Jacobi and Kesl that the two employees were admonishing the two supervisors against ". . . both continuing to bring through cattle at such a high rate and because hot cattle were dangerous to work on" (A. 39).

Based on this *conclusion* of disparate treatment the ALJ inferred the suspension and discharge of Thomas were the result of anti-union motivation in violation of the Act (A.54).

THE BOLDT SICKNESS INCIDENT

The ALJ found that during the week of July 12-16 production line employee Boldt became ill on the job and asked Supervisor Kesl to be relieved. When Kesl informed Boldt there was no one else to take his place, Boldt indicated he would ". . . stick it out as best (he) could." Thereafter, on two occasions, Kesl relieved Boldt when the latter was unable to keep up with his work (A.40-41). On the second such occasion Thomas, who worked nearby, remarked to Boldt in Kesl's presence: "Go on home Roger. They got all kinds of help breaking down the door to work here" (A.41,42). Shortly thereafter Boldt left his job without speaking further to Supervisor Kesl. The ALJ concluded the Company's treatment of Thomas was disparate because ". . . employee Halverson and other employees said the same thing to Boldt in front of Kesl at the same time and received no discipline whatsoever . . . much less discharge as was the case with Thomas" (A.47). Based on this conclusion the ALJ again inferred the discharge of Thomas was pretextual and the result of the Company's union animus.

INCIDENTS OF VERBAL ABUSE BY THOMAS

The Company presented credited evidence of repeated and regular incidents where Thomas directed profane and derogatory remarks to at least one other employee (A.30-31). Although contested by the Company, the ALJ concluded such verbal abuse was irrelevant to the propriety of Thomas' discharge (A.30-31).

REASONS FOR GRANTING THE WRIT

The Decision below raises a vital Federal question as to the parameters of proof required to show violations of Section 8(a)(3) under the burden of proof analysis mandated by *NLRB v. Great Dane Trailers, Inc.*[7]

The Decision below further presents an important question as to whether an evidentiary record *devoid* of independent direct or circumstantial evidence of animus is adequate to constitute the "substantial evidence" required under *Universal Camera Corp. v. NLRB.*[8]

In *Great Dane*, the Supreme Court established basic rules governing the General Counsel's burden of proving discriminatory purpose under Section 8(a)(3). Where discriminatory conduct is "inherently destructive" of "important employee rights," no degree of legitimate justification will absolve the employer of liability. As a result, the General Counsel need not go forward with proof of improper motive. However, where the discriminatory conduct has only a "comparatively slight" impact on protected employee rights and the employer introduces evidence of "legitimate and substantial justification" motivating the conduct, the General Counsel must prove the predominant motive was unlawful.[9]

In the case below, express findings under *Great Dane* characterizing the category of conduct ("inherently destructive" or

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[7] 388 U.S. 26 (1967).

[8] 340 U.S. 474 (1951).

[9] *See Western Exterminator Co. v. NLRB*, 565 F.2d 1114 (9th Cir. 1977) at 1118 n. 3 discussing the favored "predominant" vs. "some evidence of animus" motivation analysis in Section 8(a)(3) cases. *Accord, NLRB v. Rich's Plymouth, Inc.*, 578 Fed. 2d 880, 886 (1st Cir. 1978).

"comparatively slight") were not made by the ALJ, the Board or the Court of Appeals, notwithstanding Petitioner's *repeated* requests for such findings in its exceptions to the decision of the ALJ, and brief to the Court of Appeals. However, since "union animus" was the key issue discussed by the ALJ and approved *pro forma* through the Court of Appeals, the conduct complained of was clearly found *not* to be "inherently destructive." Such characterization follows cases discussing the rationale that discriminatory discharges are not *prima facie* "inherently destructive" if the ostensible reason for the discharge is not related to the employee's participation in "protected activity." See *Inter-collegiate Press, Graphic Arts Division v. NLRB*, 486 F.2d 837 (8th Cir. 1973); *Portland Willamette Co. v. NLRB*, 534 F.2d 1331 (9th Cir. 1976); *Kaiser Engineers v. NLRB*, 538 F.2d 1379 (9th Cir. 1976). Similarly, the discharge of a single union adherent, albeit the chief steward, does not automatically place the employer's conduct within the "inherently destructive" category. *NLRB v. Midwest Hanger Co. & Liberty Eng. Corp.*, 474 F.2d 1155, 1158 (8th Cir. 1973); *NLRB v. Neuhoff Bros. Packers, Inc.*, 398 F.2d 640, 645 (5th Cir. 1968); *Avondale Shipyards, Inc. v. NLRB*, 391 F.2d 203, 206 (5th Cir. 1968).

In the case *sub judice*, the allegedly discriminatory discharge was thus within the "comparatively slight" category. The Company introduced *uncontradicted and credited* evidence of legitimate and substantial justification for its conduct. It is clear from the Record the ALJ found no *direct* evidence of unlawful motive underlying the conduct complained of and thus resorted to inferences derived from circumstantial evidence (A.46-47). The crux of Petitioner's claim lies in the fact that *the Record is similarly devoid of circumstantial evidence of anti-union motivation*, save for such inference derived from a prior unfair labor practice proceeding. In sweeping fashion, the ALJ twice condemned Petitioner's conduct as motivated by a "history" of animus. Discussing the failure to post the backsaw operator's

job, the ALJ stated: "[r]espondent's particular animus against Richard Thomas based upon his union activities and its more general union animus has been fully demonstrated [in a prior and unrelated unfair labor practice proceeding] and in the hearing before me" (A.27). Notwithstanding the injudiciousness and bias evidenced by the latter part of the quotation, the ALJ condemned the Company's motivation on the basis of conduct having *no nexus* to the factual transaction surrounding the purported Section 8(a)(3) violation. Further, in discussing the suspension and discharge of Thomas, the ALJ summarized his finding of animus: "The evidence shows that Respondent, *on the basis of proven unfair labor practices*, has a history of union animus . . ." [emphasis supplied] (A.43).

The ALJ's entire conclusion of animus is based upon this "history" of animus purportedly established in the prior and unrelated unfair labor practice hearing. All of the ALJ's remaining references to animus are conclusions inferred from the very conduct complained of, rather than demonstrated by independent facts. *Nowhere in the remainder of the Record is independent evidence of animus established.* Such conclusory findings are *not* circumstantial evidence of animus. It is submitted that such a cavalier finding of improper motive does not withstand the judicial constraints appropriately imposed under *Great Dane*. Thus, Petitioner *does not* seek review of the Record evidence, but seeks review of procedural defects in the Court of Appeals summary affirmance of the Board.

Great Dane requires an affirmative showing of improper motive. *NLRB v. Garner Tool and Die Mfg., Inc.*, 493 F.2d 263, 268 (8th Cir. 1974). This requirement is particularly acute when motive must be inferred from circumstantial evidence. In a pre-*Great Dane* decision, *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298 (4th Cir. 1966), the Court of Appeals noted that evidence of prior unfair labor practices "is relevant in determining motivation underlying subsequent conduct by

an employer." *Id.* at 303. The *Maphis Chapman* rationale is ill-considered herein. First, in that case the Company did not contest the claim that the layoffs were motivated by union animus. *Id.* at 303. There was no question with regard to animus balanced against evidence of "legitimate and substantial" justification for discharge. Second, unlike the case *sub judice*, the prior unfair labor practice charges in *Maphis Chapman* related to discharges occurring approximately *one month* before the subsequent conduct complained of. The court therein noted the critical importance of the timing of the discharges. *Id.* at 304. Thus, inference of the employer's motive *plus* other concrete indicia of unlawful conduct were sufficient together to sustain the Section 8(a)(3) allegation. Of similar tenor is *NLRB v. Clinton Packing Co., Inc.*, 468 F.2d 953 (8th Cir. 1972), cited by the Eighth Circuit in the judgment herein requested to be reviewed, which at p. 954 cites *Maphis Chapman*.

The above logic is not at odds with *Great Dane* or Petitioner's argument herein since the inference of animus drawn from prior unfair labor practices can only have a cumulative effect circumstantially showing improper motive where there is other credible and substantial evidence indicating improper motive. However, where improper motive is not so supported by other independent evidence (circumstantial or direct), the question is whether *standing alone*, a determination of unlawful motive in a prior unfair labor practice proceeding is, as a matter of Federal law, sufficient under *Great Dane* in a subsequent unfair labor practice proceeding. Petitioner would submit such is legally insufficient.

In a recent decision, *NLRB v. Rich's of Plymouth, Inc.*, 578 F.2d 880 (1st Cir. 1978), the First Circuit Court of Appeals was presented with the same procedural issue regarding the quantum of animus which must be demonstrated in a Section 8(a)(3) case where the alleged discriminatory conduct did not arise from an employee's participation in protected

activity and the employer introduces evidence of legitimate business motives. Admonishing the Board from inferring animus solely on the basis of past instances of misconduct and the fact the employer knew of the employee's union affiliation, the court was unequivocal in its evaluation of the General Counsel's burden:

> . . . All that is left is that management representatives had demonstrated some hostility toward union efforts in conversations with Schembri and had committed some illegal actions in other contexts. *On this record we find this to be insufficient evidence of dominant antiunion motive to overcome the legitimate business justification for respondent's conduct*, see Stone & Webster v. NLRB, supra, 526 F.2d at 465; NLRB v. Puerto Rico Telephone Co., 357 F.2d 919, 920, 61 LRRM 2516 (1st Cir. 1966); NLRB v. Bird Machine Co., 161 F.2d 589, 591, 20 LRRM 2200 (1st Cir. 1947) [Emphasis added].
>
> 578 F.2d at 887-888.

The First Circuit in *Rich's of Plymouth* decided this procedural issue *precisely* as Petitioner herein would request this Court. In addition, the Eighth Circuit has similarly ruled on this issue, although failing to apply the correct rule in the case *sub judice*.

The rule which should have been applied was stated by the Eighth Circuit in *Singer Co., Wood Products Div. v. NLRB*, 371 F.2d 623 (8th Cir. 1967). In that case it was noted:

> The Examiner's report takes note of prior unfair labor practice charges made in the Singer Co., 153 NLRB No. 82, and in addition the Board in its brief points to the Singer Co., 158 NLRB No. 72. There is no indication that the decision last cited was considered or relied upon by the Examiner or the Board in reaching the decision.

The first of the above cases involved complaints filed on or before June 30, 1964, and the second case involved activity prior to November 30, 1964. *All of these activities occurred more than six months prior to the activities involved in our present case.*

In N.L.R.B. v. Southern Transport, Inc., 8 Cir. 355 F. 2d 978, 981-982, we had occasion to consider in depth the extent that past labor practices involved in prior proceedings are entitled to consideration. After thoroughly discussing this problem, we stated:

> "We, therefore, cannot hold that the adjudication of bad faith on an earlier occasion is *alone* substantial evidence of present bad faith to support the Board's finding. We recognize that the Board may view and consider the background of the parties and their past conduct as it relates to their management-employee practices, but *findings and conclusions based on that evidence alone are not sufficient for a valid order.*"

See Local Lodge No. 1424, etc., Machinist AFL-CIO v. N.L.R.B., 362 U.S. 411, 421-422, 80 S. Ct. 822, 4 L.Ed. 2d 832; N.L.R.B. v. Park Edge Sheridan Meats, Inc., 2 Cir., 341 F. 2d 725.

In our present case, there is no evidence whatsoever of present union hostility on the part of Singer [Emphasis supplied].

Id. at 625.

As in *Singer*, the instant unfair labor practices occurred more than six months subsequent to those litigated in the prior proceeding. Like *Southern Transport*, without reference to the prior proceedings, the Record is *devoid* of evidence of animus.

The logic of this approach is unassailable. An employer cannot be held to the *presumption* that a prior adjudication of improper motive conclusively taints future conduct. Such prior adjudications are alone insufficient as the *singular* basis upon which to determine an employer's subsequent motives. *NLRB v. Southern Transport, Inc.*, 355 F.2d 978, 981-82 (8th Cir. 1966).

Independent of the legal inadequacy of the Board and Eighth Circuit's finding of animus, there is a related question as to whether such a Record *devoid* of evidence of animus may be said to encompass "substantial evidence" under the *Universal Camera* rule. Petitioner contends such a dearth of evidence is legally insufficient under that case.

The *Universal Camera* case established the scope of court review of Board orders. Where the Board's decision rests upon an inadequate record, court review of the evidence is not only warranted, but essential. Here, the Eighth Circuit chose to enforce the Board's order on an evidentiary record supporting no more than speculation as to the existence of animus. Upon such a record, the Eighth Circuit has retreated from the responsibility which the Supreme Court in *Universal Camera* made clear reviewing courts must assume.

The issue herein considered is not one of affirming the Board's selection of one of two competing interpretations derived from Record evidence. Petitioner repeats it does not request review of the weight accorded the *credible* evidence which was before the Board and the Eighth Circuit. Rather, the gravamen of Petitioner's request is for a finding that an evidentiary record *devoid* of even circumstantial evidence of animus is legally insufficient to sustain the Board's Section 8(a)(3) charge, and that under *Universal Camera*, the Eighth Circuit should have refused to enforce the Board because its order was not supported by the "substantial evidence."

The Board and courts, charged with responsibility for administering the mandates of the Act, do not sit as partisan

arbiters of the competing interests of management and labor, free to impose their values upon the parties. Management is free to discharge an employee for good, bad or no cause provided such action is not motivated by union animus. *H.L. Meyer Co. v. NLRB*, 426 F.2d 1090, 1094 (8th Cir. 1970); *NLRB v. Century Broadcasting Corp.*, 419 F.2d 771, 778 (8th Cir. 1969); *NLRB v. Arkansas Grain Corp.*, 392 F.2d 161, 167 (8th Cir. 1968).

The mere existence of prior anti-union animus is not enough to support an inference of discrimination so as to relieve the General Counsel of his burden of affirmatively proving that improper motivation caused the instant discharge. In *NLRB v. Billen Shoe Co.*, 397 F.2d 801 (1st Cir. 1968), Chief Judge Aldrich stated:

> "We have only too frequently had to remind the Board that a decision on the issue of motive is particularly one which requires consideration of all the evidence, and not bits and pieces which support a decision unfavorable to the employer. See, e.g., *Raytheon Co. v. NLRB*, 1 Cir., 1964, 326 F.2d 471.
>
> If we were to draw a further lesson from this case, and too many others like it that we have had, it is that it is all too easy to say that adequate cause for discipline was seized upon as pretextual in the case of union representatives. The fact is that adequate cause for discharge is of peculiarly legitimate concern in such instances; management cannot run its plant if union organizers can ride roughshod on the basis of their position. *When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough.* The fact that the employer may be pleased to effectuate the discharge does not mean that this was his primary motive. See *NLRB v. Lowell Sun Publishing Co.*, 1 Cir., 1963, 320 F.2d 835, 842 [Emphasis supplied]."
>
> 397 F.2d at 803.

See also *NLRB v. The Freeman Company*, 471 F.2d 708 (8th Cir. 1972); *NLRB v. Winn-Dixie Stores, Inc.*, 410 F.2d 1119, 1120-21 (5th Cir. 1969); *Cain's Coffee Company v. NLRB*, 404 F.2d 1172, 1175-76 (10th Cir. 1968).

Under the guiding principles of *Great Dane*, the discharge of a union adherent cannot constitute a violation of Section 8 (a)(3) without an *affirmative* showing of improper motive, either direct or through credible inference from the substantial evidence, *logically related to the facts surrounding the discharge.* A prior and unrelated unfair labor practice proceeding is *as a matter of law*, only partially probative of general animus. Without more, such evidence is legally insufficient to meet the burden of proof requirements mandated by *Great Dane* where the employer introduces "legitimate and substantial" Record evidence justifying its conduct. The Eighth Circuit's failure to fully appreciate and rule upon this important issue of Federal labor policy opens the door to unwarranted erosion of the purposes of the Act. Petitioner herein would thus request this Court preserve the efficacy and significance of *Great Dane* by clarifying the parameters of evidence required in Section 8(a)(3) cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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September 25, 1978

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 77-1573

Tama Meat Packing Corporation,
Petitioner,
v.
National Labor Relations Board,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

Submitted: February 15, 1978

Filed: May 12, 1978

Before LAY, HEANEY and HENLEY, Circuit Judges.

HEANEY, Circuit Judge.

This matter is before the Court on petition for review of an order of the National Labor Relations Board filed by Tama Meat Packing Corporation and on the Board's cross-application for enforcement of its order. The Board's order is reported at 230 N.L.R.B. 24 (1977).

The Board found that Tama denied Richard Thomas the opportunity to advance to a higher paying position, suspended him and finally discharged him on July 22, 1976, because of his union activities in violation of §8(a)(1) and (3) of the

National Labor Relations Act. 29 U.S.C. §158(a)(1) and (3). It ordered that Thomas be offered reinstatement to either his prior job or the one with higher pay and given back pay with interest. The back pay was to be computed on the basis of the higher paying job. It also ordered Tama to post appropriate notices.

We have carefully reviewed the record and hold that the findings of the Board with respect to Thomas's suspension and discharge are supported by substantial evidence on the record as a whole, and that the Board's order with respect to the relief to be granted for the suspension and discharge is proper. We do so for the following reasons:

(1) In a prior proceeding, an administrative law judge found that Tama had committed unfair labor practices from May, 1975, to December, 1975, and had discriminated against Thomas who played a leading role in the Amalgamated Meat Cutters Union's organizational campaign during that period.

(2) After a Board election conducted on December 5, 1975, Thomas continued to wear his steward badge and other union insignia, and was active in filing unfair labor practice charges against Tama. He also participated in employee discussions with respect to Tama's June 1, 1976, announcement that gang-time would be eliminated and questioned the industrial relations manager about the announcement.

(3) Thomas had an excellent work record and had not been cited for deficiencies in his work or for absenteeism prior to his July 19, 1976, suspension.

(4) At the time of his suspension, Thomas was not given any reasons for the action.

(5) When Thomas was discharged, he was given three reasons for Tama's action. Two of the reasons given were properly found to be without substance. The third was of little

substance and involved conduct for which other employees had not been reprimanded or suspended. None of the incidents for which Thomas was discharged had been called to his attention at the time they occurred, and Thomas was not questioned with respect to his version of the incidents before he was discharged.

See N.L.R.B. v. Wal-Mart Stores, Inc., 488 F.2d 114 (8th Cir. 1973); *McGraw-Edison Company v. N.L.R.B.*, 419 F.2d 67 (8th Cir. 1969); *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693 (8th Cir. 1965); *N.L.R.B. v. Council Manufacturing Corp.*, 334 F.2d 161 (8th Cir. 1964).

Tama has raised a question about the propriety of using evidence adduced in the 1975 unfair labor proceedings to establish animus toward Thomas. At oral argument, Tama cited *Singer Company, Wood Products Division v. N.L.R.B.*, 371 F.2d 623 (8th Cir. 1967), and *N.L.R.B. v. Southern Transport, Inc.*, 355 F.2d 978 (8th Cir. 1966), in support of its position. Those cases held that an adjudication of bad faith on an earlier occasion is not alone substantial evidence of bad faith to support the Board's finding of animosity towards the union. Here, the prior adjudication does not stand alone; it is strongly supported by the other factors cited. In such circumstances, the prior adjudication can be used as evidence of present hostility. *N.L.R.B. v. Clinton Packing Co., Inc.*, 468 F.2d 953 (8th Cir. 1972).

We agree with Tama that the record as a whole does not support the Board's finding that Thomas was denied an opportunity to advance to the higher paying position of backsaw operator on July 19, 1976. The testimony does not establish that there was a vacancy in that position on that date. It is clear, however, that a vacancy did occur a few days later when Arden Vestal decided he did not want the position as a backsaw operator.

Accordingly, we enforce the Board's order insofar as it relates to Thomas's suspension, discharge and back pay with the following minor exception. Thomas is to receive back pay as a backsaw operator only from the date that Arden Vestal decided that he did not want that position.

Costs shall be taxed to the appellant.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
for the Eighth Circuit

Tama Meat Packing Corp.,
Petitioner,
v.
National Labor Relations Board,
Respondent.
No. 77-1573.

JUDGMENT

(Filed July 5, 1978)

Before: LAY, HEANEY and HENLEY, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Tama Meat Packing Corp., to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns, on June 10, 1977, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 15, 1978, and has considered the briefs and transcript of record filed in this cause. On May 12, 1978, the Court, being fully advised in the premises issued its decision granting enforcement of the Board's order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Tama Meat Packing Corp., Tama, Iowa, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in a labor organization by failing or refusing to offer to its employees transfers to other employment positions or suspending or discharging any of its employees or otherwise discriminating against them because of their membership in, sympathies for or activities on behalf of Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-46, herein called the Union, or any other labor organization.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer Richard L. Thomas immediate and full reinstatement to his former job and to the position of backsaw operator or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the unlawful discrimination against him in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy," as modified by the Court's opinion.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Judgment.

(c) Post at its offices copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the

Regional Director for Region 18 of the National Labor Relations Board (Minneapolis, Minnesota), after being duly signed by Petitioner's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said Notices are not altered, defaced or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days of this Judgment, what steps Petitioner has taken to comply herewith.

DATED July 5, 1978

Costs taxed in favor of Respondent:

Costs of printing 10 copies of brief:	$103.14
Total costs of Respondent for recovery from Petitioner:	$103.14

A true copy:

Attest: Robert C. Tucker

Clerk, U. S. Court of Appeals, Eighth Circuit

July 28, 1978

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order, as Modified, of the National Labor Relations Board

An agency of the United States Government

WE WILL NOT discourage membership in a labor organization by failing or refusing to offer to our employees transfers to

other employment positions, or suspending or discharging any of our employees, or otherwise discriminating against them because of their membership in, sympathies for, or activities on behalf of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL P-46, herein called the Union, or any other labor organization.

WE WILL NOT in any other manner, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer to Richard L. Thomas reinstatement to his former position and to the position of backsaw operator or, if those positions no longer exist to substantially equivalent positions, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our unlawful discrimination against him, together with interest at the rate of 6 percent per annum, as modified by the Court's opinion.

TAMA MEAT PACKING CORP.
(Employer)

Dated.....

By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Offices, 316 Federal Building, 110 South 4th Street, Minneapolis, Minnesota 55401, Telephone (612) 725-2615.

APPENDIX C

JPW
D—2551
Tama, Iowa

230 NLRB No. 24

United States of America
Before the National Labor Relations Board

Tama Meat Packing Corp.

and

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-46.

Case No.
18-CA-5065.

Decision and Order

(Issued June 14, 1977)

On February 7, 1977, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

---

[1] The Respondent has excepted to certain credibility findings made by the Administratice Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Tama Meat Packing Corp., Tama, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. June 10, 1977.

HOWARD JENKINS, JR.,
Member

JOHN A. PENELLO
Member

PETER D. WALTHER
Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX D

JD-69-77
Tama, Iowa

United States of America
Before the National Labor Relations Board
Division of Judges

Tama Meat Packing Corp.

and

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-46

Case No. 18-CA-5065

A. Stevenson Bogue, Esq., Minneapolis, MN, for the General Counsel

Joseph P. Carey, Esq., Tarrytown, NY, for the Respondent

Decision

(Issued February 7, 1977)

STATEMENT OF THE CASE

Robert W. Leiner, Administrative Law Judge: The above-captioned matter was tried before me on November 16 and 17, 1976, in Marshalltown, Iowa. On July 21, 1976, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local P-46 (herein called the Union) filed a charge against Tama Meat Packing Corporation (herein called Respondent) alleging violation of Section 8(a)(1), (3) and (4) of the National

Labor Relations Act, as amended, herein called the Act. A Complaint and Notice of Hearing issued on September 2, 1976, alleging, *inter alia*, that Respondent violated Sections 8(a)(1), (3) and (4) of the Act in refusing to transfer its employee, Richard Thomas, to the position of utility man; in denying Richard Thomas transfer to the position of "backsaw" operator; and thereafter unlawfully suspending and discharging him. Respondent denied the allegations of the complaint and alleges that Thomas was suspended and discharged for cause; that its failure to transfer him to the position of utility man was due to the abolition of that classification; and that its denial of transfer to the position of backsaw operator occurred because Thomas was already discharged. Briefs were duly filed on January 7, 1977 by both General Counsel and Respondent. Upon the entire record, particularly my observation of the witnesses and their demeanor, and after due consideration of the briefs filed herein, I make the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleges, Respondent admits, and I find, that Respondent, at all material times, has been and is a corporation organized under and existing by virtue of the laws of the State of Iowa, maintaining a principal place of business in Tama, Iowa, where it has been engaged in the business of nonretail processing and distribution of meat and meat products. During the year ending December 31, 1975, a representative period of Respondent's operations, Respondent processed, sold and distributed at its Tama, Iowa facility, goods valued in excess of $50,000 of which goods valued in excess of $50,000 were shipped from said facility directly to points located outside the State of Iowa. During the same period, it purchased and had

transported to the said Iowa facility, goods valued in excess of $50,000 which were transported to said facility directly from points outside the State of Iowa. Respondent admits, and it is found, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, Respondent admits, and I find that the Union is, and has been all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

Tama Meat Packing Corp., a beef slaughterhouse, commenced operations on or about September 27, 1971, having hired employees as early as May, 1971. Richard Thomas, the alleged discriminatee herein, was hired in October, 1971. The alleged unfair labor practices occurred at Respondent's plant in Tama, Iowa.

On September 30, 1976, the Board issued an Order and Direction of Second Election in Cases Nos. 18-CA-4809 and 18-RC-10677, wherein it directed, *inter alia*, that an election conducted between the parties herein on December 5, 1975, on a petition for certification filed by the Charging Party relating to a production and maintenance unit of Respondent's Tama, Iowa employees, be set aside and a new election be held.[1] The Board Decision and Order, finding that Respondent violated Section

[1] The underlying facts, contained in the Administrative Law Judge's decision, show that the Charging Party herein also lost a Board-conducted election in the same unit in December, 1973.

8(a)(1) of the Act in various respects, and forbidding their repetition, issued upon Respondent's failure to file exceptions to the recommended decision of Administrative Law Judge Josephine H. Klein in the above-consolidated case, which decision was issued on August 10, 1976 after hearings held May 3 to May 5, 1976. The 8(a)(1) violations found included Respondent (1) having announced an unlawful wage increase; (2) impressing employees with the futility of selecting the Union as their statutory representative and the inevitability of a strike and violence in the event of unionization; (3) stating that it would not bargain with the Union; (4) threatening employees with the loss of employment and other benefits in the event of a strike; (5) unlawfully interrogating employees concerning their union sympathies; and (6) unlawfully giving employee Richard L. Thomas two written warnings of disciplinary action on September 12 and December 17, 1975, because of his activities on behalf of the Union.[2] It was to these findings and conclusions and the Direction of a Second Election that Respondent failed to take exceptions. Included in the affirmative action recommended by the Administrative Law Judge and adopted, *pro forma* by the Board, was a direction to Respondent to expunge from its records any and all copies of and references to the warning notices given to employee Richard Thomas on September 12 and December 17, 1975.

B. *Richard L. Thomas; Union Activities*

There is no dispute that Thomas was among Respondent's first employees, employed in October, 1971, as a "flanker" at

[2] The first warning notice (General Counsel's Exhibit No. 4) accused Thomas of physically threatening coemployee, Kenneth Dahlman; and the second warning notice (General Counsel's Exhibit No. 3) accused Thomas of spreading a false rumor. Both warning notices were found not only to have been untrue, but to have been issued because of Thomas' union activities in violation of Section 8(a)(1) of the Act (Judge's opinion, p. 24).

$3.50 an hour. He was discharged, allegedly for cause, on July 22, 1976 at which time his pay was $5.75 an hour. It is also undisputed that he was first suspended on July 19, 1976; that his supervisor at all material times was Stanley Sasker; and that his employment record with Respondent carried no adverse comments except for the two unlawfully motivated warnings of late 1975, *supra*.

Thomas' union activity began in May or June, 1975 when he requested the Charging Party's president to organize Respondent's plant. On September 29, 1975, the Union sent to Respondent, care of Respondent's president, Milton L. Whittington (who had become Respondent's president in March, 1975) a letter which advised Whittington that the employees of Respondent had created an organizing body and elected a shop steward in an effort to organize Respondent's employees. Among the six members of the organizing committee elected by these employees of Respondent was Richard Thomas. It also appears that, together with a union agent (Fred Curler) and Richard Thomas' brother, Ed Thomas, Richard Thomas was a chief distributor of union membership cards and a chief collector of the executed cards. In this September, 1975 election for union committeemen, Richard Thomas received the most votes and was named chief steward. Thereafter, until his discharge on July 22, 1976, Richard Thomas wore on the front of his work helmet a red sticker (described as the union "steward" sticker measuring somewhat larger than a silver dollar) and, at the back of his helmet, a yellow sticker showing his membership in the Union. While other committeemen and other employees from time to time wore the red steward sticker and the yellow union membership sticker, the undisputed testimony is that Thomas was the only employee who, after the Board-conducted December 5, 1975 election, which the Union lost, wore both of them. On November 20, 1975, prior to the Board-conducted election, Thomas wrote a letter to all unit employees answering alleged misstatements by Respondent. Thomas urged all employees to

vote for the Union. The record also shows that while there had been approximately six union meetings held prior to the December 5, 1975 Board-conducted election, after the election, there was only one meeting. That meeting, held at the end of December, 1975, was attended by 8 to 10 employees and it related only to a discussion of whether the Union would file unfair labor practice charges against Respondent.

It is further undisputed that at the May, 1976 consolidated hearings before Administrative Law Judge Josephine Klein, Thomas was a prominent witness, testifying both in the direct case and in rebuttal.

C. *The Instant Unfair Labor Practices*

(1) *The failure to transfer Thomas to the job of "utility man" or "utility butcher":*

Paragraph 5(a) of the complaint alleges that during late June or early July, 1976, Respondent unlawfully denied Richard Thomas a transfer to the position of "utility man."

Whatever the exact contours of the functions of a "utility man" or "utility butcher," the evidence shows that among duties of that classification, the "utility man" fills in for any other employee who is sick, temporarily injured, on vacation, or fatigued and in need of a spell of rest. The utility man requires knowledge of all or almost all of the skills involved in Respondent's production unit and is among those employees most highly paid. At the time of Thomas' discharge on July 22, 1976, and at all material times prior thereto since mid-June, 1976, the person fulfilling at least the functions of "utility man" (Respondent insists that, commencing June 14, 1976, there was no such job title or classification, but rather that on that date the job and title had been materially altered to that of "kill floor leadman," al-

legedly a much expanded job, with the job of "utility man" having been abolished) was James Kesl. Thus Respondent alleges that Kesl was no "utility man" but rather the "kill floor leadman." Prior to Kesl, it is undisputed that the actual job of "utility man" was held by Jerry Jacobi. According to Respondent, Jacobi was the last person to hold that job.

The last occasion on which the job of utility man was posted for "bidding" was on July 23, 1975 (Respondent's Exhibit No. 2). Respondent followed a "bid" system in advertising among its unit employees for rights to jobs which became available through other employees quitting, being promoted, or discharged. In the bidding system, Respondent posted a notice on its bulletin board for two days describing the particular job opening, together with its rate of pay. Permanent employees signed their names to the posted notice if they wanted the open job. The employee with the most seniority who signed the posted notice would then be placed in the job and was also given time to try out the job and break in. A prominent exception to the bid system was that an employee who bid for a job requiring lower qualification than the job in which he was presently working was thereafter frozen out of bidding on a job of higher classification for a 1-year period (Respondent's Exhibit No. 6). In any event, Jerry Jacobi was the successful bidder for the "utility butcher" job in his bid on the July 23, 1975 posting. The bid sheet shows, and it is not disputed, that, at that time, employee Mike Hoffer was immediately second in seniority to Jacobi with Richard Thomas, third.

About a year later, on or about June 14, 1976, Jerry Jacobi was promoted to the supervisory position of Assistant Kill Floor Foreman. The General Counsel alleges, and Richard Thomas testified, that the utility man's job thus became open but was never posted, that the Respondent failed to post the job as open because he would have succeeded to it as the most senior employee; and that the failure to post the job was motivated by Respondent's union animus.

In support of this position, Thomas testified that he had several conversations with supervisors regarding the fact that Jacobi's June 14 promotion left the utility man's job open. Thus, some three weeks after the promotion, Thomas spoke to plant superintendent Donald Derham. Thomas asked Derham when the utility job would be posted for bidding and Derham, showing no anger or impatience, did not answer and walked away. Sometime in late June, 1976, Thomas also spoke with his supervisor, Stanley Sasker. While Thomas was discussing the matter of the open utility man job with coemployee Dale Albee, Sasker walked by and Albee asked Sasker when the job would be posted. Sasker answered by saying: "[J]im Kesl's the leadman." Lastly, on July 2, 1976, Thomas, in the presence of other employees and supervisors, again asked Derham when the job would be posted and Derham answered: "I've just got my job to do." At this point, Thomas turned to supervisor Earl Rutledge and asked: "What kind of answer is that?" To this, Rutledge merely laughed, shook his head and walked off.

I do not believe that these conversations, with their ambiguous answers and with Sasker directly telling Thomas that Kesl was the "lead man," support the General Counsel's theory that the conversations indicated that the failure to post the job was discriminatorily motivated. I conclude that the conversations demonstrate the supervisors reluctance to discuss the matter with Thomas and that such reluctance does not, of itself, manifest discriminatory motivation.

(2) *Respondent's defense with regard to the allegations regarding its denial of posting the utility man job:*

On June 9, 1976, Respondent distributed personally to all employees a document (Respondent's Exhibit No. 1), with a further copy mailed to their homes, in which, *inter alia*, it was asserted that Respondent was faced with increased competition, that it was no longer competitive economically with other em-

ployers in its business, and had decided to reduce its labor costs. No evidence to the contrary of these contentions was adduced and no unlawful motivation to its promulgation was alleged. Respondent stated therein that, effective June 14, it would not only eliminate from employees' pay a production bonus practice ("gang time"), but it would also eliminate a guaranteed 40-hour week and reduce the guarantee to 36 hours.[3] Respondent, at the same time, nevertheless granted a 15-cent an hour wage increase effective July 5. In addition, it also published at that time, attached to the same announcement, classifications of its production jobs into seven "skill levels" for all employees, together with wage rates for each such skill level (Respondent's Exhibit No. 1, page 2). The seven skill levels start with the most elementary level called "base labor" followed by six additional skill levels. The wage rate for each skill level is higher than the previous skill level. The fifth skill level includes the job classification "flanker" which was held at all material times by Richard Thomas. The highest classification, "Skill level six" has four jobs included therein: "Back Saw; Maintenance Lead Man; Electrician; and Kill-Lead Man."

Respondent's Personnel Manager and Director of Industrial Relations, Robert Bristol, testified that the position of utility man had indeed existed until June 14, 1976 but that effective that date (in accordance with the June 9 statement of Respondent's president in Respondent's Exhibit No. 1), the job no longer existed. It no longer existed, he testified, because it was not included in the new job classifications which were published by Respondent on June 9, 1976. Rather, he testified, the utility man job was expanded into a different job called "kill leadman"; that the classification of utility man was dropped; and that James Kesl, was appointed kill leadman on

[3] The practice of "gang time" payment is discussed *infra*. It should be noted that all persons described as supervisors herein, were admitted to be "supervisors" within the meaning of the Act.

June 14, 1976. Bristol testified that in addition to the duties of utility man, the new "leadman" position not only made the holder an acting supervisor in the absence of a foreman, but among other things, unlike the utility man, required him to keep records of "downtime" on the production floor, attend supervisors' meetings, respond to complaints of the United States Department of Agriculture inspectors where there were such problems on the production floor, and to assign and reassign employees on the production floor as production requirements changed. In addition, Bristol, supported in part by Kesl, testified that Kesl recommended wage increases and promotions, functions never performed by the utility man. While Bristol's testimony thereafter showed that with regard to wage increases and promotions, Kesl's recommendations, would be completely reviewed by the supervisor—thus diminishing the power of his recommendations—Kesl testified without contradiction, and other evidence of record showed, that he had indeed, the power to transfer production employees from one job to another and exercised that power extensively on the production floor (Tr. 218-225). Evidence adduced by General Counsel failed to show said power in the utility man job prior to June 14, 1976.

Bristol testified that on the same day (June 14, 1976) that Jacobi was promoted from utility man to kill floor foreman, the utility man's job, in accordance with the June 9 announcement, was abolished and Kesl was made the new kill floor leadman. Furthermore, Respondent states that there was no posting for the new leadman job because the job itself was not subject to bidding in that it was no longer a unit job but rather a trainee supervisor job. In addition, it was stipulated that in 55 separate postings for job openings in the entire period June 15, 1976 to November 3, 1976, there was no posting for either "utility man" or for "leadman." Bristol testified that the "utility man" job was dropped and the "leadman" position was initiated because Respondent did not want to fill the new leadman job, which incorporated the functions of the

old utility man's job, by seniority alone, since the job led directly to a supervisory position (Tr. 386). Indeed, the old holder of the utility man job was invariably promoted to supervision.

Finally Respondent points to the undisputed fact (Respondent's Exhibit No. 3) that after July 1, 1976, the employee with the most seniority was Arden Vestal; the employee with the next most seniority was Dale Albee and that the third in highest seniority was Richard Thomas.

The testimony of both Bristol and Sasker show that as early as June 11, 1976, Sasker was told by superintendent Derham of the change in the utility man's job to that of leadman and decided to tell Kesl of the change. On that same day, Sasker called Kesl into his office and told him that he was the new kill floor leadman and had duties beyond that of utility man.

(3) *Discussion and Conclusion:*

The record shows that employees Arden Vestal and Dale Albee had seniority over Richard Thomas at all times up to and including June 14, 1976. Thus, had the job been posted, assuming that the job remained vital, it would appear that employees Arden Vestal and Dale Albee would have first call on the job rather than Thomas. In short, the evidence shows that (a) the job was never posted and therefore Thomas' bid was never rejected; (b) the job as utility man was abolished by exclusion from the new classification published June 9, 1976, and there is no proof that it was abolished for discriminatory reasons; (c) in any event, had the job been posted, Thomas was not the most senior of the employees, and, on this record, would not have gotten the job anyway. Then, as counsel for Respondent points out, the problem with Thomas' position—apart from abolition of the job—is that his claim would be

hypothetical since he was not the most eligible and, indeed, never signed up. I agree.

I conclude, as above-noted, that Thomas' conversations with his supervisors were at best inconclusive on the question of discriminatory motivation and at worst showed that Kesl had already been assigned to the job of kill floor leadman.

In passing, it must be noted that Thomas testified that after June 14, he observed Kesl on the job and that Kesl's functions as a "leadman" were no different than the functions he observed when Jacobi had the job as "utility man." Thomas' observations might well be correct. But he in no way contradicted Respondent's witnesses' testimony that the leadman had the additional responsibility of recordkeeping on downtime, the ability to direct the employees in their work, attend supervisor's meetings and the other indicia of a changed job.

Even assuming the existence of widespread animus and unlawful conduct by Respondent, as noted by Administrative Law Judge Josephine Klein in her prior decision involving these parties, and in view of my own decision regarding Respondent's further unlawful activities, I conclude that the General Counsel's burden to prove the unlawful denial of transfer, in June or July, 1976, with regard to violation of Section 8(a)(3) and (4) to the position of utility man has not been met and I shall therefore recommend that the complaint allegation, paragraph 5(a) be dismissed.[4]

---

[4] Moreover, even if Respondent denied Richard Thomas the position of kill floor leadman because of union animus, I would conclude such denial did not violate the Act. For the evidence showed contrary to Respondent, that Kesl, as kill floor leadman, was not merely a supervisor "trainee" or a "managerial employee", *N.L.R.B. v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 85 LRRM 2945, who would advance into management, *Curtis Industries*, 218 NLRB 1447 (1975). Kesl's consistent exercise of the power to transfer employees on the prodution line from one job to another, in his own judgment, based on the necessities of keeping the production line in operation, make him a "supervisor" within the meaning of Section 2(5) of the Act even though he did not wear a supervisor's hat. Respondent, of course may select its supervisors, its agents to direct the operation of the production line, without regard to their union activity, seniority or other criteria. I conclude that Respondent, in promoting Kesl to a *supervisory* position, could lawfully pass over the more senior Richard Thomas even for discriminatory reasons. In so concluding, I am mindful that, as General Counsel observes, on one hand, no posting of a leadman job occurred after the new June 14, 1976 classifications, and yet, on the other hand that the *posted* pay rate for kill floor leadman (skill level six) is no higher than for unit jobs: Backsaw operator and electrician (Respondent's Exhibit No. 1, page 2). Bristol, however, testified without contradiction (Tr. 383) that Kesl was earning more than the *posted* rate, and, in fact, was not paid the posted rate of $5.75 per hour but rather was immediately paid $6.40 per hour. As noted in the text, I conclude that the utility job was abolished and that the kill floor leadman job was established thereafter; that the evidence failed to show an unlawful motive in that arrangement; but that even if Respondent passed over Thomas for discriminatory reasons, it was privileged to do so. No evidence relating to an unlawful 8(a)(4) motivation was adduced so as to show retribution for Thomas' participation in prior Board proceedings.

(4) *The failure to transfer Thomas to the position of "Back Saw operator":*

Paragraph 5(b) of the complaint alleges that in July, 1976, Respondent denied Richard Thomas a transfer to the position of back saw operator in violation of Section 8(a)(1), (3) and (4) of the Act.

The schedule of rate classifications (Respondent's Exhibit No. 1) which Respondent issued on June 9, 1976, shows that the position of "back saw" operator is in skill level number 6, Respondent's highest paid classification.

The backsaw operation requires (and it is Respondent's practice) the use of two backsaw operators operating each hour alternately. Until the beginning of July, 1976, the two backsaw operators were Roger Fisher and Norman Jacobs. Employee

Darrel Davis, who had been informally trained in the operation of the backsaw by his father-in-law (a former employee of Respondent) filled in for both Jacobs and Fisher when either of them was absent because of vacation, illness or otherwise. On July 1, 1976, Roger Fisher gave notice that he was quitting his employment the next day to take another job. On that same day, July 1, Respondent, according to its practice, posted the job as open for bidding and placed the notice on the bulletin board (Respondent's Exhibit No. 3). Almost a dozen employees signed up including Arden Vestal, Dale Albee and Richard Thomas. At that time Vestal was most senior, Albee was second and Thomas, third. The fourth employee in seniority who had signed the list was Darrel Davis. The evidence is uncontradicted that Vestal was chosen to try out for the job and given a reasonable amount of time to decide whether he wanted it.

Thomas testified that he saw Darrel Davis perform the job as early as Friday, July 16, or Monday, July 19, 1976 (Tr. 114). Davis denied that he worked the backsaw until July 26 and particularly denied working the backsaw in the week beginning July 19. I do not credit Davis.[5] Sasker directly contradicted Davis and testified that Davis worked the backsaw until Vestal declined (Tr. 279) on July 26. Sasker didn't offer the job to Thomas because he had no replacement for Thomas. I do not credit Sasker.

There is no dispute that Davis commenced the backsaw job sometime after July 26 on a permanent basis. The evidence shows that Davis got the job in the following manner. Vestal, the most senior employee who had signed up for the job, actually started the backsaw job, on or about July 5, on a part-time basis, and then was on the backsaw, on and off, as he was released from time to time from his regular job in the "cooler" by his supervisor Earl Rutledge. The evidence also shows that Vestal executed a document for Respondent on July 26, 1976 in which he declared his desire *not* to have the backsaw job. Moreover, he testified that one week earlier, on July 19, 1976, he told his supervisor, Earl Rutledge that he did not want the job as backsaw operator.[6] It was on July 26 that Rutledge called Vestal into his office and told him that if he (Vestal) didn't want the job, he had to fill out a written rejection slip. It was on July 26 that Vestal did so. However, even after that Vestal worked on the backsaw on July 27 to help out because the Respondent was short-handed.

[5] I credit Thomas in that he saw Davis doing backsaw work on July 16 and July 19. Davis testified that he worked the backsaw for an hour at a time immediately after Vestal got the job around July 5 (Tr. 327).

Discussion and Conclusions

Respondent takes the position that Arden Vestal had the first seniority opportunity on the job and since the job was not formally rejected by Vestal[7] until July 26, 1976, and since Richard Thomas was already discharged on July 22, 1976, it was clear that Richard Thomas could not be considered for the backsaw job because he was no longer an employee.

General Counsel points to the fact that as soon as Respondent knew that Roger Fisher was quitting, by virtue of the notice thereof he gave on July 1, 1976, it posted the backsaw job for bid. By analogy, according to the General Counsel, supervisor Rutledge was told as early as July 19, according to the uncontradicted testimony of Vestal, that Vestal did not want the job. General Counsel then states that had Respondent followed its

[6] Vestal's timecards (Respondent's Exhibit No. 8) showed he worked on the kill floor, July 19, 1976, therefore as a backsaw operator, since his job in the cooler was not on the kill floor.

[7] The next most senior employee after Vestal was Dale Albee. Albee was frozen out of competition for the backsaw operator job because he had bid on a lower job in the past year.

normal routine, as indicated by the previous posting of July 1, for the same job, when it knew that Roger Fisher did not want the job, it should have posted the job as being open on July 19. Rather than do that, it waited until July 26 to give the job to Davis upon Arden Vestal's formal, written declination. In short, the General Counsel argues that Respondent, for discriminatory reasons, did not post the job on July 19 because Thomas would have gotten the job since Albee had been frozen out.

Unlike the case of the alleged unlawful transfer to the "utility man" job, above, Respondent offered no explanation of why it failed to post the backsaw job when it first learned that Arden Vestal did not want the job on July 19.[8] Certainly its immediate posting of the job on July 1, when Roger Fisher first gave notice of his leaving and even before he actually left the job, indicates that Respondent manifested an eagerness to insure that no hiatus would exist in filling the job. This is particularly true on the uncontradicted evidence that Respondent, at all times, was shorthanded on its production floor. An unfilled job on the production line might well mean interference with production, a situation which Respondent reasonably had found intolerable and was a prominent reason for action taken with regard to its employees. The backsaw operation is a production line job. While Davis was experienced as a backsaw operator, that would not explain the failure to post the job especially since Sasker did not know and did not seek to discover if Thomas could operate the backsaw (Tr. 277).

I regard Respondent's failure to post the job on the 19th as more than a suspicious, coincidental circumstance. While there is no direct evidence to suggest that the job was not posted on the 19th because Thomas would get the job, the circumstances convinces me that this motive guided Respondent's conduct. Thus, (1) Respondent's particular animus against Richard Thomas based upon his union activities and its more general union animus has been fully demonstrated before Judge Klein and in the hearing before me; (2) Respondent, in failing to post the open backsaw position, departed from its past practice of doing so, a practice which it had performed for the same position as recently as 18 days before when Roger Fisher gave notice; (3) Richard Thomas, by virtue of his seniority following Vestal and Albee, would have gotten the job. This raises a *prima facie* case of Respondent unlawfully preventing Thomas from getting the job on July 19 when Vestal told supervisor Earl Rutledge

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[8] Vestal testified that (a) for about one week prior to his written declination of July 26, he didn't work the backsaw, and (b) it was about one week before he signed the declination that he told his supervisor, Rutledge, that he didn't want the job. Vestal was a witness called by Respondent. Respondent asserts that this testimony is contradicted by the testimony of three other of Respondent's witnesses: Davis, Sasker and Rutledge.

Rutledge testified that he did not know Vestal did not want the job until Vestal signed the written declination on July 26. I reject this testimony. While there may be some room in Vestal's testimony concerning how long before he signed the declination that he told Rutledge of his declination, there is no room for Rutledge's testimony that "suddenly he [Vestal] didn't want the job." (Tr. 296).

Sasker's lack of recollection regarding these events was demonstrated at the hearing (Tr. 271-279). Moreover, I regard his estimate that Vestal worked on the backsaw for 2½ to 3 weeks (Tr. 272) as probative of the fact that Vestal's last day on the job as an applicant was July 19 since Vestal started on July 6 (Tr. 273 *et seq.*).

Davis is the incumbent in the job and has an obvious interest in the testimony that he was not given the job prior to Thomas' suspension. Thus, while I agree with Counsel for Respondent that Davis had a "strong interest in the backsaw job" (Resp. Brief, p. 9), that interest does not redound in favor of Davis' credibility. Moreover, I found that Sasker far from corroborating Davis, as Respondent avers (Resp. Brief, p. 9) contradicts him. For Sasker, contrary to Davis, testified that Davis was on the backsaw from July 6 to July 26 (Tr. 279).

Thomas had testified that Vestal was in the backsaw job only about 1 week before Davis succeeded him (Tr. 57). Thomas said that by Friday, July 16 or Monday, July 19, Davis was already in the job (Tr. 114). This supports Sasker and contradicts Davis.

In this conflict, I credit Thomas as corroborated by Respondent's witness Vestal, and discredit the mutually inconsistent testimony of Sasker and Davis.

that he didn't want the job. When such a *prima facie* case is joined with complete failure by Respondent to explain why being shorthanded,[9] it did not at once post the job as open,[10] the inference, it seems to me, should be drawn that Respondent failed to post because Richard Thomas would then be in line for the job. Such conduct, I conclude, was based on discriminatory considerations violates Section 8(a)(3) and (1) of the Act.[11] No evidence exists on this record that Respondent's motivation related to Thomas' having given testimony at Board proceedings or otherwise participated in Board proceedings as alleged.

Therefore I find, that Respondent, in denying to Thomas the opportunity of employment as a backsaw operator, was motivated by animus concerning his union activities and violated Section 8(a)(1) and (3) of the Act. Having found no evidence in this record that the motivation also included Thomas' prior Board testimony or activities at the prior Board proceedings, I shall recommend that the 8(a)(4) allegation be dismissed.

The suspension of Richard Thomas on Monday, July 19, 1976

On July 19, 1976 (Monday) after the end of the workday, at about 3 p.m., supervisors Sasker and Jacobi (the foreman and assistant foreman on the kill floor) told Richard Thomas to go to plant superintendent Derham's office. Thomas said he was in a hurry but they escorted him to the plant superintendent's office.

[9] The evidence is uncontradicted that Respondent forced Vestal, on July 27, 1 day after he had rejected the job in writing to perform the backsaw job.

[10] Immediate posting would have been on July 19, 1976.

[11] Respondent failed to argue—perhaps wisely—that it would not in any case have offered the job to Thomas on July 19 because Respondent, *after* work that day, decided to suspend Thomas (Tr. 59-61). The hurried suspension without giving Thomas the reason therefore, is discussed *infra*.

After a few minutes of waiting, in which Thomas asked them to do whatever they were going to do the next day, Sasker, Jacobi and Thomas entered the office where they found Derham and Robert Bristol, Respondent's director of industrial relations. Thomas said to Derham: "Another one of those deals, huh?" Derham replied: "Yes, I guess so, sit down." Thomas said: "Let's have it." Derham then nodded towards Bristol and Bristol, reading from a sheet of paper, answered: "Rich, we are authorized to inform you, at this time, that you have been placed on indefinite suspension." Thomas then asked for the reasons for his suspension and Bristol responded: "We have not been authorized to give you a reason at this time." There was no further conversation and Thomas left the plant. On the next day, Tuesday, July 20, Bristol sought out[12] Thomas' supervisor Stanley Sasker and his leadman Kesl regarding the incident. They told him of another incident: that Thomas, in the previous week, told employee Roger Boldt to go home because Boldt was ill even though Boldt told Kesl he would remain on the job in spite of the illness.[13]

The evidence is also uncontradicted that on or about June 14, 1976, employee Kenneth Dahlman was promoted into the supervisory ranks. Both before and after that date, Dahlman had told Bristol that Richard Thomas called him derogatory names on a consistent basis. Bristol testified that he made a note of the complaint.

The discharge of July 22, 1976

Following the July 19 indefinite suspension, Respondent sent the following certified letter, dated July 22, 1976, to Thomas (General Counsel's Exhibit No. 6):

[12] Bristol testified in substance, that Respondent was having a great many problems and he wanted to see what other problems Thomas may have caused (Tr. 195-196).

[13] Neither Sasker nor Kesl reported the incident to Bristol or to other high supervisory authority.

Dear Mr. Thomas:

On Monday [sic] July 19, 1976 you were indefinitely suspended pending an investigation into your behavior as an employee of Tama Meat Packing Corp.

The investigation has now been completed by management. During the past week of July 12-16, 1976 you told a fellow employee not to move the cattle ahead to fill the chain, causing a slow down in production. You also convinced another employee to go home sick after he had indicated to his supervisor he would work out the day. You also have been guilty of disruptive conduct by addressing derogatory remarks to other employees. This behavior cannot be condoned. You are hereby discharged immediately.

Signed

/s/ STAN SASKER
STAN SASKER
Kill Floor Supervisor

It is undisputed that Thomas was never told by management which fellow employee he told not to move the cattle ahead on the chain which caused the slowdown in production. Thomas specifically denied all testimony relating to his telling an employee not to move the cattle ahead, including the testimony of employee Mark Rutledge, which was to the contrary. With regard to the assertion concerning Thomas' convincing another employee to go home sick after the employee told the supervisor that he'd work out the day, Thomas testified that no supervisor ever identified the employee or requested his version of the matter, but he identified employee Roger Boldt as the employee who went home sick in the week of July 12, 1976, sometime before Thomas was suspended.

With regard to the third reason advanced by Respondent for the discharge, addressing derogatory remarks to other employees, Thomas specifically denied making such remarks to em-

ployee Kenneth Dahlman. It might be recalled that it was the September 12 warning notice regarding alleged physical threats to Kenneth Dahlman which Administrative Law Judge Klein found to have been unlawfully inspired (General Counsel's Exhibit No. 4) and which she directed be expunged from Thomas' record. Notwithstanding Thomas' specific denial of calling Dahlman names, I credit Dahlman's contrary testimony to the effect that before and after Dahlman was promoted to a management position on June 14, 1976, Thomas called him "suck ass" and "brown nose." A history of such name calling was allegedly reduced to memorandum by Bristol but it was never produced at the hearing. According to Respondent's Director of Industrial Relations, Robert Bristol, this name calling however would not have independently caused the discharge of Thomas but was merely an additional reason supporting the discharge. Name calling was never the basis of any warning to Thomas. In view of Bristol's testimony, in view of the admitted banter going on in the plant, some of which was not apparently in good nature, and the overall lack of seriousness in which Respondent evidently viewed the matter, I do not regard this name calling as significant notwithstanding that in other circumstances, Respondent might be within its rights in freeing itself of an employee who called such names to its employee. In view, however, of the above state of the record, I conclude that neither by itself nor in conjunction with Thomas' other conduct would it have caused Respondent to discharge Thomas.

The two principal incidents which, according to Respondent, caused the discharge were an incident involving Thomas' telling a fellow employee not to move the cattle ahead on the chain, thereby slowing down production, hereinafter referred to as the Mark Rutledge incident; and his telling another employee (Roger Boldt) to go home sick after the employee allegedly told the employee's supervisor that he would work out the day, hereinafter called the Roger Boldt incident.

The Mark Rutledge Incident; Friday, July 16, 1976[14]

The first of the three reasons advanced by Respondent in its discharge letter (General Counsel's Exhibit No. 6) is that in the week of July 12-16, 1976, Thomas ". . . told a fellow employee not to move the cattle ahead to fill the chain, causing a slow down in production."

The production process in Respondent's Tama, Iowa plant, as adduced by evidence in this record, shows that cattle are first "killed" and then hoisted on chains by the rear feet. Their throats are cut to allow bleeding. Progressive dismemberment follows as the carcasses travel along past employees to two physical levels: employees working on elevated platforms dismembering the raised hindquarters; employees on the floor dismember the lower forequarters. Ostensibly, the dead ("cold") cattle, on chains which have bled out then follow an overhead track ("feeder line") to an overhead switch which automatically interrupts the flow of carcasses to the employees working further down on the cattle on the "main line." When this automated feeder switch fails (the failure sometimes caused by the weight of too many new carcasses bunched up against the arms of the switch), the carcasses do not approach the waiting employees one at a time at preset intervals as would be the case if the switch were in working order. Until the switch is repaired ("freed"), the carcasses back up behind the switch. In order to maintain a flow of carcasses to the waiting production employees, the carcesses must therefore be pulled manually past the broken switch and down the production line. All employees on the

[14] It was this incident, alone, which caused Thomas to be suspended (Tr. 18) without reference to any other misconduct. As will be seen, *infra*, supervisor Earl Rutledge reported the Mark Rutledge incident to Respondent's Director of Industrial Relations on Saturday, July 18. By further investigation into Thomas' misconduct, Bristol learned of the Boldt incident, *supra*, on July 20, 1976.

floor are obliged[15] to pull cattle through manually, otherwise production beyond the switch would be brought to a halt (i.e., there would be a "hole" in the line) (Tr. 228-230).

Sometimes the cattle, even upon reaching the main line, are not actually dead. These are called "hot" cattle. To work on them even as far down as the main line, may involve physical danger to the employees since the "hot" carcass, attacked by cutting devices, reacts by kicking. Injury to the knife-wielding employee may result (Tr. 231). "Hot" cattle are pulled through a broken switch as well as cold cattle, although it is relatively uncommon for hot cattle to be encountered beyond the switching point.

On July 16, 1976, the automatic switch broke on three occasions. Employee Mark Rutledge was employed in the "blood pit" on the main level of the production line. The cow, having been "knocked in the head" and presumed dead, is hoisted on the chains, headed for the "blood pit" for bleeding out. Mark Rutledge's job, performed on the work floor, i.e., the lower level, was to slit the throat, permit the carcass to bleed off and also to cut off the ears (Tr. 234). The "blood pit" is immediately under the automatic switch. The next employee position down the line from Rutledge on July 16 was the "Cap bung" position which was occupied up on the platform by employee John Hoffa.

Leadman Kesl testified that on one of the occasions on that day when the switch broke, he noticed that no cattle were going along the main line. He said he then went over to employee Mark Rutledge and asked him why he wasn't pulling the carcasses through manually. Rutledge allegedly said, pointing up to Thomas on the level above him: "Because Rich Thomas told me to not to" (Tr. 218). On his part, Rutledge could not remember any such conversations with Kesl (Tr. 361-362) and

[15] There is no written rule; it is a matter of plant practice.

particularly recalled that when the switch broke on the third occasion, no one asked him to pull cattle through (Tr. 353). Kesl then pulled the cattle manually through the switch to fill the production line. Kesl testified that the carcasses he pulled through were "cold."

Kesl testified that at about 3:30 p.m., after the end of the workday, he told supervisor Stanley Sasker of what Rutledge told him (Tr. 218-219). Sasker, called by Respondent, failed to testify on this point. Sasker did not mention the matter to Thomas or to higher supervisory authority.

Richard Thomas, in rebuttal, denied ever telling Rutledge not to move cattle ahead on a production line (Tr. 458-459). And in direct examination and rebuttal, without contradiction, he testified that he did not know what incident formed the basis of the assertion in the discharge letter; that no one from management ever identified the employee or asked for his version of the incident (Tr. 65).[16] The discharge letter is silent on the matter.

The Director of Industrial Relations, Bristol, testified that he didn't ask Thomas for his version of the incident because: (1) Thomas had already been suspended and was not on the premises; (2) "I just didn't feel like anywheres [sic] asking him about the incident" (Tr. 187).[17] Similarly, when Bristol learned, from

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[16] Kesl at first placed the Rutledge incident of July 16 as before the incident involving the illness of Roger Boldt, *infra* (Tr. 237). Although neither General Counsel or Respondent introduced Boldt's timecard or other evidence on the point, it appears from all the evidence that the Boldt incident occurred before the Mark Rutledge incident. Kesl thereafter said he wasn't sure which incident occurred first (Tr. 248).

[17] A full explanation of why Bristol did not ask Richard Thomas for his version of this incident which was the root cause of the July 19 suspension appears in Bristol's cross-examination (Tr. 187-188):

Q. Did you learn about the incident prior to his suspension?

[*Footnote continued on following page*]

leadman Kesl or supervisor Stanley Sasker, on Tuesday, July 20, of Thomas telling employee Roger Boldt to go home because of Boldt's illness, he did not question Boldt because he already had leadman Kesl's statement of the event (Tr. 197).

Mark Rutledge, brother of supervisor Earl Rutledge, testified that after the switch broke the second time in the afternoon,[18] he pushed two or three dead cattle past the broken switch when Richard Thomas, up on the ledge said to him (Tr. 349):

> Why push the beef down? We're not getting paid by beef.
>
> We're getting paid by the hour. Let the foremans [sic] do it. It's not going to help you.

Rutledge did not answer Thomas.

A. Yes I did.

Q. And you had Rich Thomas right in your office at the time you suspended him, why didn't you ask him then?

A. The investigation was not completed at that point.

Q. What I am saying why wasn't he a part of the investigation?

* * *

A. All right [it was] reasonable to assume that there was offense serious enough here to warrant a discharge, but we didn't know that for a fact at that point. So, until the investigation was concluded we weren't going to tip our hat as to just which way we were going to pursue this thing. It could have been such a thing that it turns out completely foundless [sic] and he would have been reinstated and no problems.

It therefore appears that Bristol did not question Thomas when Thomas was in his office in the act of being suspended because investigation had not been completed. And Bristol didn't question him after the investigation was completed because Thomas was "not on the premises" (Tr. 187). Thus, Thomas could not be questioned at all on that logic, a "Catch-22" rationale. Actually, as Bristol testified (Tr. 187), he "just didn't feel like" asking Thomas about the incident, because, as Bristol later said, it might ". . . tip our hand." To put it mildly, this is the language not of investigation, but of predisposition.

[18] Rutledge testified that the switch also broke in the morning and that another employee pulled the carcasses past the switch on that occasion (Tr. 351).

The evidence is undisputed that prior to President Whittington's announcement of June 9, 1976 (Respondent's Exhibit No. 1, p. 1), production employees were paid "gang time." Whittington's announcement effective June 14, 1976, eliminated gang time and the 40-hour guaranteed workweek. "Gang time" was a speedup production procedure whereby employees, ordinarily paid at the rate of processing 100 carcasses per hour, had the carcass processing rate, for instance, speeded up to 144 carcasses per hour Respondent paid the employees for approximately 12 hours' work because of such a speedup rather than for 8 hours' work (Tr. 90).[19] It appears, therefore that the reference in the above statement by Thomas to Rutledge relating to "not getting paid by the beef" refers to the elimination of the "gang time."

Mark Rutledge, later that Friday evening, told his brother, supervisor Earl Rutledge, of the incident and his brother told him not to pay attention to Thomas but to his supervisor (Tr. 353).

On cross-examination, Mark Rutledge testified that no delay in the production line occurred on the occasion of the second breakdown of the switch because of what Thomas yelled down to him (Tr. 356). As above-noted, Kesl testified that, when the switch broke down the third time, he ". . . grabbed the cattle and filled in the holes in the line to get caught up." (Tr. 230). Rutledge could not say that he saw Kesl manually pulling cattle through at any time that day (Tr. 360). Contrary to Kesl, Rutledge testified specifically that he could not recall any conversation with Kesl that day in which Kesl asked: "Why don't you push them through?" to which Rutledge would have responded "Thomas told me not to." (Tr. 361-362)

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[19] Counsel for Respondent argued, and unsuccessfully sought from Thomas on cross-examination the admission, that the elimination of "gang time" and the 40-hour guaranteed workweek, so angered Thomas that he caused the instant charges to be filed by the Union (Tr. 96). There is no evidence linking Thomas' loss of earnings to the filing of the charge herein. I reject Respondent's argument.

On the basis of the above conflicting testimony, I credit Mark Rutledge and discredit Richard Thomas, and find that Thomas did yell down to Rutledge what Rutledge testified to regarding pulling the carcasses through manually. I also discredit Kesl insofar as his testimony conflicts with Rutledge's recollection: that Rutledge could not recall any conversation with Kesl in which Kesl asked him why he had not pulled the cattle through. I am particularly mindful that Sasker's testimony did not corroborate Kesl's assertions that Kesl told Sasker of the incident. Rather, I conclude that Kesl pulled the cattle through upon seeing the cattle were not being pulled through. Thus I conclude that Rutledge was not asked by, and did not tell, Kesl the version which Kesl alluded to.

In rejecting Thomas' denial and crediting Mark Rutledge's testimony, I have noted that Rutledge, although the younger brother to supervisor Earl Rutledge, hardly knew Thomas. The undisputed testimony shows that there was no "bad blood" between Thomas and Mark Rutledge and Thomas could think of no reason why Rutledge would invent such a story involving Thomas.

On the record before me, therefore, there is evidence that there was a potential hole in the production line which resulted from a broken switch. I also find that Thomas told Rutledge not to manually pull the cattle through the switch. Whether Rutledge did not thereafter, on the third breakdown, pull carcasses through because of Thomas's admonition or because no one told him to do so (as he testified) or because he returned to his own job (as he testified) is not controlling. The record is not clear whether any loss of production would have been substantial because of what Thomas said to Rutledge, but I conclude that, contrary to the allegation in Respondent's discharge letter, Kesl's pulling the cattle through manually prevented any actual loss of production attributable to any statement or action of Richard Thomas.

In any case, I do not regard as material any discrepancies between the assertion in Respondent's letter that a slowdown was in fact caused by Thomas and a finding that there was either no such slowdown or that it was *de minimus*. For I conclude that Thomas' statement to Mark Rutledge had a tendency to interfere with production and thus was a most serious matter under any interpretation, and notwithstanding any union animus which Respondent may have directed toward Thomas. I conclude that Respondent need not accept conduct from an employee which merely tends to interfere with the production line regardless of whether it has that actual effect. Thus I see no material difference, for the purposes of reasonably invoking the strictest discipline, between an act of Richard Thomas which actually interfered with production and one, like the present, which may merely have tended to interfere with such production.

Rebuttal testimony of Richard Thomas and Roger Boldt: Disparity of treatment

In rebuttal, however, Richard Thomas and Roger Boldt testified that employees John Hoffa and Roger Boldt, on a day during the week of July 12-16, 1976, yelled down from their work stations for two supervisors, Jacobi and Kesl, not to pull the cattle through so fast. Kesl could not remember if it occurred around the same time as Thomas' yelling down to Rutledge (Tr. 249). Neither Boldt nor Hoffa suffered discipline for such statements.

Leadman Kesl testified that John Hoffa had yelled at him for "bringing hot cattle" through the broken switch in such large numbers that the carcasses were being brought to positions out of the working reach of Hoffa and Boldt. He recalled Hoffa saying that if Kesl was going to bring the cattle through into those positions, he could come up on the balcony and do the work himself. The evidence adduced on this point shows that

so many carcasses were being brought through into the area where Hoffa and Boldt were dismembering the cattle, that the carcasses were not in their proper position and Boldt and Hoffa had to reach far over the ledge in order to work on them.

Counsel for Respondent would distinguish between the Hoffa-Boldt incidents on one hand and the Thomas incident on the other, on the ground that Hoffa and Boldt did not tell anybody not to pull through the cattle, but merely that *if* they were going to pull through so many hot cattle, the employees (Boldt and Hoffa) couldn't keep up production (Tr. 250). As I understand the Hoffa and Boldt's statements, they were admonishing Respondent's supervisors against both continuing to bring through cattle at such a high rate and because hot cattle were dangerous to work on.[20] Supervisor Jerry Jacobi testified that Boldt had called down to him because carcasses were going by so fast that they could not be worked on. Jacobi testified that he did not remonstrate against Boldt for his statement because it did not appear to him that Boldt was angry in making the statement (Tr. 505). There is no evidence that Thomas was angry or even that the question of Thomas' emotional state in admonishing Mark Rutledge was deemed material.

I do not see an essential difference between Thomas telling Mark Rutledge not to pull through the cattle past the broken switch on a manual basis and Boldt and Hoffa, on the other hand, telling Jacobi and Kesl not to pull so many cattle past. In both cases, there was a statement whereby employees were manifesting an intent to others to slow down production and in neither case was there an actual slowdown. The fact of the matter is, however, as Kesl admitted, that he never reported the

[20] Hoffa did not testify. Boldt said Hoffa yelled to Kesl who was pulling through the hot cattle too far, that Kesl ". . . should come up there and help him" (Tr. 479). Boldt yelled the same things to supervisor Jacobi (Tr. 481). Under such conditions, the employees could not keep up with the volume of work (Tr. 481).

Hoffa-Boldt incidents to Sasker, as he allegedly reported the Thomas incident,[21] or to Robert Bristol after Bristol heard about the Mark Rutledge incident from Earl Rutledge. He told Bristol only about Richard Thomas, but not about Hoffa and Boldt, because Bristol was seeking evidence regarding Thomas' conduct. It is clear, therefore, that in the two incidents relating to Boldt in which Richard Thomas was involved, James Kesl, at least according to his own testimony and the testimony of Sasker and Bristol, allegedly failed to inform his superiors and Respondent that other employees had done more or less the same thing as Thomas. As will be seen hereafter, in the incident involving the illness of Roger Boldt, Kesl failed to tell his superiors (allegedly because he hadn't heard) that employee Steve Halverson and other employees, as well as Richard Thomas, had counselled Roger Boldt to go home because of Boldt's sickness; and in the case of Thomas calling down to Rutledge, Kesl (and Jacobi) failed to tell Bristol, who was corroborating the Mark Rutledge incident which he had heard from Earl Rutledge, that employees Boldt and Hoffa had called down similar things to that which Thomas yelled down to Mark Rutledge.

The Roger Boldt sickness incident; Disparate Treatment

Boldt works as a "rumper" about 5 to 10 feet from Thomas' work station on the elevated balcony above the work floor. During the week of July 12-16, but before Thomas yelled to Mark Rutledge concerning pulling carcasses through the broken switch manually, *supra*, at about 8:30 a.m. before the first work break, Boldt told Thomas and other employees he didn't feel well. Boldt asked leadman Kesl for a replacement because of

[21] As above-noted, I have not credited Kesl's testimony that he told Sasker of the Thomas-Rutledge incident. Had he actually done so, and Sasker having failed to act, Sasker's conduct would indicate how unimportant was Thomas' statement to Mark Rutledge in Sasker's eyes.

illness but Kesl said he had no one to fill in for him. Boldt testified he then told Kesl that he would ". . . stick it out as best I could." Kesl testified that Boldt told him he ". . . would try to stick the day" (Tr. 247). Kesl testified that Boldt appeared sick and asked to be replaced. Kesl told him that he could not replace him because the only replacement available would be Kesl himself and then there wouldn't be ". . . anybody to watch the floor" (Tr. 247). At various times thereafter, until 10:30 a.m. when Boldt left to go home, Boldt became ill at his workplace. Thomas and other employees tried to help fill in for Boldt but were not successful. Thus Thomas and Boldt testified that Kesl, on two occasions, relieved Boldt at his job at the upper level. Sometime in mid-morning, the overhead chain which carries carcasses past Boldt and Thomas stopped. The evidence shows that employee Steve Halverson stopped the chain and pushed the buzzer thereby summoning leadman James Kesl. Thomas then saw Boldt sitting on the guardrail with his head in his hands, his face white. This was the first occasion on which Kesl relieved Boldt. Thereafter Halverson pushed the button again to stop the chain and Kesl came up for the second time to take Boldt's place. Thomas testified without contradiction that Boldt could not keep up with the job and that the carcasses were going by without being "rumped out." Ond a third occasion, with Boldt being sick, Halverson buzzed for Kesl again but Kesl did not come up. Boldt walked away and said nothing. Thomas, in all three episodes, said nothing to Boldt except, according to Thomas, on the second occasion, in Kesl's presence (Tr. 77): "If I felt that bad I would go home." Thomas, corroborated by Boldt (Tr. 441), testified that employee Steve Halverson and other employees told Boldt the same thing at the same time in front of Kesl. Kesl denied hearing any other employee say anything to Boldt regarding Boldt's "illness." Kesl testified that (Tr. 240) he heard Thomas tell Boldt "Go on home Roger. They got all kinds of help breaking down the door to work here."

Boldt testified that after he became repeatly ill before 11 a.m., he told Kesl that he could not stick it out any longer and

that Thomas told him: "If I were feeling that bad, I'd go home. They surely can find so meone to replace you." Boldt said that Kesl was present and s d nothing. Boldt also testified, without contradiction, that he told Kesl he was going home even before Thomas suggested that Boldt go home (Tr. 442). Kesl reported the incident to foreman Sasker and said he didn't think Boldt would have gone had not Thomas suggested it.

In spite of Boldt's corroboration of Thomas' version, my observation of Thomas, Kesl and Boldt (a clearly friendly witness to Thomas) leads me to conclude that Kesl's latter, idomatic version was correct. Kesl admitted never having asked Boldt why he left that day. Boldt did not return to work for 2 days and was under a doctor's care. Kesl knew of no investigation by other supervisors into Boldt's illness. Kesl told his supervisor, Stanley Sasker, of this incident, but the record fails to disclose that Sasker took any affirmative action on the basis of this information.[22] Sasker, however, did tell Bristol of the incident on the following Monday or Tuesday, prior to the time that Thomas was discharged during the time that Bristol was investigating Thomas' misconduct in the Mark Rutledge incident, *supra*.

It is unnecessary to resolve the credibility question as to whether, as Thomas and Boldt testified, Thomas said to Boldt that: "If I felt as bad as you, I would go home" or whether, as Kesl testified, that Thomas said that Boldt should go home and that there were "employees breaking down the door to come in." Both versions amount to the same thing. I conclude, that Thomas did tell Boldt that he should go home because he looked too ill to continue to work. On the question of whether Boldt told Kesl that he was going home even before Thomas made the remark to Boldt in Kesl's presence, and even though the testimony was not contradicted by Kesl, I severely doubt whether Boldt made this statement to Kesl. In short, I do not credit the uncontradicted testimony of Boldt that he told Kesl that he intended to go home even before Thomas made the remark. On the other hand, I credit Boldt and Thomas and discredit Kesl in finding that Halverson told Boldt essentially the same thing that Thomas did, and, moreover, said it to Boldt at the same time as Thomas told Boldt to go home, in Kesl's presence. I conclude that Kesl heard Halverson make the same or similar remarks to Boldt as Thomas' remarks in the same conversation.

[22] Again, Sasker also failed to advise higher management or take other action when Kesl allegedly told him of the Mark Rutledge incident on the previous Friday, July 16.

Discussion and Conclusions

The evidence shows that Respondent, on the basis of proven unfair labor practices, has a history of union animus directed against the Charging Party in general and against Thomas in particular commencing in 1975. I have already found, above, that Respondent acted unlawfully, in violation of Section 8(a)(3) and (1) of the Act, in failing to offer Thomas the opportunity to bid on the backsaw operator job. In the present instance, regarding his suspension and discharge, Respondent asserts that it discharged Thomas for cause: for engaging in misconduct in the above three incidents: the Mark Rutledge incident, the Roger Boldt incident and the Kenneth Dahlman incident.

1) With regard to the Kenneth Dahlman incident, I have already taken into account Respondent's Director of Industrial Relations remark that that incident would not, of itself, have been a cause to discharge and was merely an aggravating circumstance. In view of Respondent's own evaluation of the lack of seriousness of the name calling against Dahlman, longstanding and widespread name calling throughout the plant as admitted by Kesl, the existence of the memorandum on the name calling without action taken thereon, I see no reason to give it any

greater probative weight than the Respondent itself has given it. I conclude that Thomas' remarks to Dahlman and other employees did not constitute so serious a breach of discipline as would lead Respondent to discharge Thomas even in conjunction with other breaches of discipline. Furthermore the interposing of such a reason in the discharge of the chief union steward, already the subject of Respondent's unlawful attention, seems to me to also cast doubt on other apparently more formidable reasons.

(2) The Board may not substitute mere suspicion or surmise for credible evidence. *Ashland Oil Co.*, 201 NLRB 524 (1973), *N.L.R.B. v. Guard Tool and Die Inc.*, 493 F. 2d 268 (C.A. 8, 1974). It may be assumed for purposes of this Decision and I assume, that Richard Thomas' suggestion or admonition which I find, under all the circumstances and in spite of his denial, to have been made to Mark Rutledge, that Rutledge should not move the cattle through manually, was substantial enough to be a cause to discharge; or, in the alternative, was not so insubstantial as to not warrant an inference that another reason was the true cause for the discharge. *Big Three Industries, Inc.*, 192 NLRB 370, 375 (1971). Indeed, the Board has repeatedly held that if an employee provides an employer with sufficient cause for discharge by engaging in conduct for which he would have been terminated in any event, the Board cannot find the discharge unlawful by merely showing that the employee engaged in union activity. *Kate Holt Co.*, 161 NLRB 1606 (1966); *Golden Nugget, Inc.*, 215 NLRB No. 20 (1974). The mere fact that the employee is or was participating in union activities does not insulate him from discharge. *N.L.R.B. v. Ayer-Lar Sanitarium*, 436 F. 2d 45, 49 (C.A. 9, 1970). In short, an employer has the right to discharge an employee for any reason, whether it is just or not, and whether it is reasonable or not, as long as the discharge is not, in part, in retaliation for union activities or support. The question of proper discipline of an employee is a matter left to the discretion of the employer. An employee's

stated or avowed opposition to a labor union is not sufficient evidence to sustain a finding that its employee was discharged because of discrimination against the Union. The Board is limited to determining whether there was a discriminative motive behind an employee's discharge and not whether the Board agrees with an employer's reasons or even finds them reasonable. See: *The Consolidated Diesel Electric Co.*, 469 F. 2d 1016, 1024; *N.L.R.B. v. Ogle Protection Service, Inc.* (C.A. 6, 1967), 375 F. 2d 497, 505-6; cert. den. 389 U.S. 843. While the employer must be permitted to discharge the inefficient, the irresponsible, the disobedient, and the immoral, *Martel Mills Corp. v. N.L.R.B.*, 7 LRRM 382, 391, an employer may not discharge an employee where the real motivating purpose is to do that which Section 8(a)(3) forbids, *Lawson-United Feldspar Co.*, 189 ULRB 350, 357. The determination of the employer's actual motivation where, as here, a union leader has broken a shop rule and has been discharged is a "delicate task," *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 311 (1965).

There is no disagreement with Respondent's contention that because Richard Thomas was the chief union steward, the Board and the Courts had not given him a "license" to violate company rules or to be immune from discharge. To the contrary, the position of shop steward does not immunize the holder of that position from discharge even in the presence of outbursts of union animus by the employer. See *Fairmont Mayo Hotel*, 198 NLRB 462.

If a discharge is motivated by antiunion design, such discharge is violative of the Act even though the employees had performed misdeeds which would warrant his dismissal. *Frosty Morn Meats, Inc. v. N.L.R.B.*, 296 F. 2d 617, 620 (C.A. 5). Direct evidence of discriminatory motivation is not necessary to support a finding of discrimination as such intent may be inferred to the record as a whole. *Heath International, Inc.*, 196 NLRB 318; *Florida Steel Corp.*, 224 NLRB No. 78. Even

a finding that Richard Thomas was not properly discharged for cause would not, in itself, establish that the discharge was violative of Section 8(a)(3) of the Act as alleged in the complaint. The real motivation must be found on the basis of inferences. *Big Three Industries, Inc.*, 201 NLRB 700, citing *N.L.R.B. v. Melrose Processing Co.*, 351 F. 2d 693, 698 (C.A. 8). Illegal motive has been held supported by a combination of factors, such as coincidence in union activity and discharge, disparity of treatment, general bias and hostility toward the Union, variance from the employer's normal routine, and implausible explanation by the employer for its actions. *W.T. Grant Co.*, 210 NLRB 622.

Applying the above principles to the case at hand, the evidence of record, including my observation of the witnesses, shows that (a) Richard Thomas, as counsel for Respondent points out, was a cocky individual and perhaps sometimes exuberant in his dealings with Respondent's supervisors. Counsel for Respondent states that Thomas was "arrogant." I did not see that in my observation of Thomas. (b) Thomas testified extensively at the prior Board hearing before Judge Klein as late as May, 1976 and was a prominent supporter of the Union who did not hide his union sympathies. I was particularly impressed with the fact that even after the election in which the Union was defeated on December 5, 1975, Thomas wore prominent union identification on his helmet unlike other union stewards and supporters who apparently no longer sought to remain prominently identified with the Union. (c) There is nothing in this record which indicates any manifestation of Respondent's displeasure with Thomas' work record or conduct over the five years of his employment prior to the two unlawful warnings which appear in his records commencing September 12, 1975, which warnings were found to have been unlawfully motivated and were directed by Judge Klein to be expunged from his record. (d) In balancing the underlying evidence upon which inferences regarding Respondent's motivation of discharge are based,

Carbide Tools, Inc., 205 NLRB 318, 328, there must be taken into account Respondent's unfair labor practices against and general hostility towards the Union and particular hostility toward Richard Thomas based upon his union activities. While such evidence by no means is dispositive, as Counsel for Respondent emphasizes in his brief, I would be naif to ignore such evidence. And I am not required to be naif. *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 460 (C.A. 9, 1966). (e) Regardless of the exact language used, I have concluded that Thomas did tell Roger Boldt that he looked so ill that he should go home. I have also concluded, contrary to the testimony of Kesl, that employees Halverson and other employees said the same thing to Boldt in front of Kesl at the same time and received no discipline whatsoever from Respondent on account of such suggestions much less discharge as was the case with Thomas. I view Respondent's treatment of Thomas, in this regard, as disparate.[23] (f) The most significant reason advanced by Respondent for the discharge of Thomas, and indeed the misconduct which alone was the basis for Thomas's suspension on July 19 (Monday) was that his statement to Mark Rutledge caused a slowdown in production. While there was no actual slowdown in production, Rutledge having already pulled through the carcasses on a manual basis after the breakdown of the switch, the remark, contrary to Thomas' denial, tended to dissuade Rutledge from again performing the manual pull through of the carcasses. What we are dealing here with, therefore, is not that Thomas' remarks caused an immediate breakdown in production, but that they tended to cause an interference with an employee's future conduct. It was Kesl's shouldering of that burden which thereafter prevented an actual loss of production. I regard Thomas' remark to have been a serious matter indeed, and I would perhaps find that statement, by an

[23] It is only arguable which is more disparate: Kesl having heard Halverson and not reporting him to Sasker as he reported Thomas; or Respondent, having heard of the incident, failing to discipline Halverson as it disciplined Thomas.

employee of Thomas' persuasiveness, sufficient cause to conclude that the discharge, although eminently suspicious, was caused by Thomas stepping over the line and attempting to interfere with production, especially at a time when, according to the evidence at hand, Respondent was fearful of its economic position. This genuine fear of competitive position was demonstrated by Respondent's notice to all employees (Respondent's Exhibit No. 1, dated June 9, 1976) in which it eliminated the commission based on production ("gang time") and also lowered the guarantee of hourly work from 40 to 36 hours. Thus, I conclude that Respondent's concern, particularly in the summer of 1976, was for production and elimination of excess costs. The record, however, does not close on this point. For the circumstances of this case, including the testimony of Robert Bristol, Roger Boldt and Respondent's supervisor Jerry Jacobi, sheds extensive light on Respondent's response which Thomas' admonition to Rutledge brought about; and which causes me to conclude that such response (Thomas' suspension and discharge) was derived from pretextual, unlawful motives.

There is no doubt in my mind, on the basis of Board decision, as above-noted, that Respondent's reaction to an employee's interference with production may be swift and unconditional without its being unlawful, notwithstanding that the employee was an active union member and the object of unlawful conduct on a prior occasion. Thus, interference with or deficiencies in production, or the harassment of other employees relating to production, are themselves reasons for discharge which cannot be undermined by concomitant and open engagement in union activity. *Sweetheart Plastics, Inc.*, 209 NLRB 776. Here, the evidence is that employees Boldt and Hoffa called down to supervisor Jacobi and leadman Kesl not to pull through "hot" cattle so quickly because the employees were not able to keep up with the production line. The awkward position of the cattle, pulled through so far and so fast by these two supervisors, required Hoffa and Boldt to lean out from the ledge to do their

cutting work. Jacobi testified that had he and Kesl listened to Boldt and Hoffa and had not pulled the cattle through there would have been a "hole in the line" (Tr. 505), and an interruption in production. Neither Kesl or Jacobi reported to higher supervision the statements by Boldt and Hoffa. The admonitions of Boldt and Hoffa, like that of Thomas, would have caused an interference in production. I regard the apparent failure by Kesl and Jacobi to report Boldt's and Hoffa's admonition to be disparate compared to reporting Thomas' statement to both Boldt (regarding his sickness) and to Rutledge (regarding production) to supervisor Sasker. This disparity in treatment, I find significant. Thomas was discharged. Boldt and Hoffa were apparently not reported. As Jacobi testified, he didn't remonstrate against Boldt because Boldt did not seem "mad" when he spoke to Jacobi. This had no bearing on the question of whether Boldt's and Hoffa's conduct would interfere with production. (g) Of even greater significance, I find two aspects of Respondent's conduct demonstrating the pretextual nature of its disciplining Thomas, hiding its union animus as the motive for the discharge: (a) I find Respondent's failure to investigate both the Roger Boldt illness matter and the Mark Rutledge report of the Thomas admonition, beyond speaking to their own supervisors, peculiarly unsatisfactory and (b) I regard supervisor Sasker's failure to act or react significantly, after being informed of both the Roger Boldt sickness incident and the Mark Rutledge production incident (I have specifically discredited Kesl's contrary testimony on the point, however) to be inconsistent with its view that the misconduct was substantial enough to form the basis of suspension and later discharge.

The record herein shows that Stanley Sasker is Richard Thomas' supervisor. The record also shows that Sasker was one of the two supervisors who warned Richard Thomas, in writing, of prior misconduct with regard to "threatening" Kenneth Dahlman on a physical basis. It was this threat, along with another one, that was ordered expunged from Thomas' work record.

With regard to (a), above, Respondent's alleged good-faith belief that it was Thomas' suggestion to Boldt to go home that caused him to leave because of illness I find unconvincing in view of the fact that there was no investigation. This is totally apart from the fact that Kesl never reported—as Boldt credibly testified—that it was not Thomas alone who made the suggestion that Boldt go home but other employees including Halverson.

With regard to the Rutledge incident, while it is true that Respondent spoke not only to supervisors, but also spoke with Mark Rutledge, I find that the lack of a further investigation, including getting Thomas' version of the facts, indicates that Respondent, having heard of Thomas engaging in conduct which would specifically give rise to a basis for getting rid of him, seized upon the matters as reported to it with an unshakable tenacity from which they would not be deflected. Had the investigation widened, Respondent would have had to take into account Boldt's statements, whether true or not true, that Boldt (1) would have gone home because of illness regardless of anything Thomas said (Tr. 448); (2) denied that Thomas told him that he should go home and let the foreman do his job, and that applicants for employment were breaking down the doors to work for Respondent (Tr. 450); (3) was told by employee Steve Halverson to go home in the same conversation that Richard Thomas told him to go home; and that both statements were made in Kesl's presence at the same time (Tr. 451-454). As I have said above, it is clear to me that Boldt was a witness friendly to Thomas. On the other hand, Boldt, still employed by Respondent, was giving testimony directly contrary to Respondent's interests and facing Respondent's supervisors in the hearing room. See: *Georgia Rug Mill*, 131 NLRB 1304. There is no suggestion in this record that Halverson was ever the subject of discipline for saying substantially the same thing to Boldt that Thomas said.

I conclude that the decision in *Firestone Textile Co.*, 203 NLRB 89, 95, is particularly applicable here:

> The Board has consistently held that an employer's failure to conduct a full and fair investigation of an employee's alleged misconduct is evidence of discriminatory intent, especially when viewed in the light of the employer's union hostility. *Norfolk Tallow, Inc.*, 154 NLRB 1052, 1059; *Shell Oil Company v. N.L.R.B.*, 128 F. 2d 206, 207 (C.A. 5, 1942); *J. W. Martell Co.*, 168 NLRB 435, 452, enf'd with modification, 440 F. 2d 455, 458 (C.A. 7, 1971).

With regard to (b), above, it will be recalled that the Thomas admonition to the sick Roger Boldt occurred prior to the Mark Rutledge incident and thus occurred sometime prior to July 16, 1976. The Mark Rutledge incident, the admonition not to pull the carcasses through manually past the broken switch, occurred in the mid-afternoon of July 16, 1976. Leadman Kesl testified that he told Sasker of the Boldt incident (Tr. 254-246) at the time of the occurrence and that he told Sasker of the Mark Rutledge incident after work on that day (Tr. 218):[24] Although Sasker was called as a witness by Respondent, there is no testimony by Sasker or any other Respondent witness to show that Sasker told Bristol or any other of Respondent's supervisors of either of these incidents at any time after they happened, much less immediately upon their occurrences. Earl Rutledge heard of the incident regarding his brother and Friday night, July 16 and reported it to Bristol on the next morning (Tr. 312). Bristol investigated the Mark Rutledge incident the next working day (Tr. 180). In view of the Boldt admonition and the Mark Rutledge incident forming the basis for the discharge, and particularly the Mark Rutledge incident forming the basis for the July 19 suspension, I find it particularly noteworthy that Sasker did not take action against Thomas or even tell Bristol of either of

[24] Again, I have not credited Kesl on this point.

the incidents. Sasker, apparently no friend of Thomas, was one of the signers of the written warnings against it, thought so little of the both of these incidents that he never reported either of them to Bristol. This is not altogether different from Sasker's conduct upon first learning of the alleged threat by Thomas to inflict physical harm on employee Kenneth Dahlman which Judge Klein discussed in her Decision (p. 24). Judge Klein found that Sasker thought so little of the threat in that case that he made no comment. Here, in the face of both of these alleged important elements of misconduct, Sasker took no action. Indeed, when Kesl told Sasker of the Mark Rutledge incident regarding the admonition which would interfere with production, Kesl could not even recall Sasker's response (Tr. 218). (h) Lastly, I am particularly mindful of Director of Industrial Relations Bristol's testimony regarding why he did not tell Thomas, at the time of the suspension on July 19, when Thomas was in Bristol's office, of the reasons why Thomas was being suspended. Bristol's testimony that he didn't want to reveal the nature of the reason of the suspension because it might involve Respondent "tipping" his hand and that Bristol "just didn't want to talk to Thomas," indicates to be a position of such an adversary nature that it no longer could be regarded as investigatory but was merely eliminating any opportunity for Thomas to extricate himself from an apparently difficult situation. As I said before, it was a matter more of predisposition to corner Thomas rather than to investigate the facts of alleged misconduct. In this regard I also note that Bristol testified that he didn't believe that a mere warning would suffice with regard to Thomas' misconduct in the Mark Rutledge matter because he had already warned Thomas twice and such warnings did not improve Thomas' conduct. The two warnings that he admitted he had in mind were the two illegal warnings which were issued based upon Thomas' union activities (Tr. 207).

Such testimony by Bristol bolsters my conclusion that the reasons for suspension and discharge were pretextual and that Respondent's actual motivation was based upon union animus.

In the instant case, therefore, I have found that Respondent has engaged in disparate conduct in its punishment of Thomas with regard to both the Mark Rutledge and Roger Boldt matters; failed to investigate the alleged misconduct in a reasonably fair and open matter; and in light of the aforementioned union animus and unlawful conduct by the Respondent, I draw the inference, from the entire record, that there is a preponderance of evidence of an unlawful, discriminatory basis in the suspension and discharge of Thomas. I therefore conclude that the suspension and discharge of Thomas on the July 19 and July 22 violated Section 8(a)(1) and (3) of the Act.

I have found no evidence that Respondent's desire to discharge Thomas was based in any way on his having testified in prior Board proceedings or because he otherwise cooperated with the Board. I shall therefore recommend that the complaint be dismissed insofar as it alleged that any of Respondent's conduct toward Thomas violated Section 8(a)(1) and (4) of the National Labor Relations Act as amended.

In sum, the fact that Respondent, as counsel for Respondent argued, did not also discharge other known union advocates who continued to remain on Respondent's payroll, does not negative any discriminatory unfair labor practice directed against Thomas, *Great Atlantic and Pacific Tea Co.*, 210 NLRB 593. In any event, however, the fact that other union advocates remain in Respondent's employ can be distinguished from the case involving Richard Thomas. For Thomas, the chief steward, as the record abundantly shows, was not merely a union advocate, but a union sore thumb.

CONCLUSIONS OF LAW

1. By failing and refusing to transfer or offer the opportunity to transfer to the position of backsaw operator to Richard

Thomas, during July 1976; by suspending Richard Thomas on July 19, 1976; and by discharging Richard Thomas on July 22, 1976, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

2. The General Counsel failed to prove, as alleged, by a preponderance of the evidence that during late June or early July, 1976, Respondent denied employee Richard Thomas a transfer to the position of utility man in violation of Section 8(a)(1), (3) and (4) of the Act, or that Thomas was discharged in violation of Section 8(a)(4) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act and have a close, intimate and substantial relation to commerce and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has committed various unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act, in the manner customary in such cases.

Having found that Respondent improperly suspended and discharged Richard L. Thomas, I shall recommend that he be offered reinstatement with backpay at 6 percent interest per annum in conformity with the rules announced in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Having found that Respondent unlawfully failed to offer to Richard L. Thomas the position of backsaw operator, I shall recommend that Respondent be ordered to offer him both said

position and his old position in its offer of reinstatement, and that any employee employed in either position be replaced if necessary. As is customary in Respondent's plant, Thomas shall have a reasonable period of time, but not less than three consecutive weeks, to decide whether to accept the job of backsaw operator.[25] Since there is no assurance that Thomas would have refused the backsaw operator job, backpay will be computed on the basis of what Thomas would have received absent Respondent's discrimination against him, i.e., on the basis of the backsaw operator rate of pay, commencing July 19, 1976, when employee Vestal refused to continue in the job.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[26]

ORDER

Respondent, Tama Meat Packing Corp., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in a labor organization by failing or refusing to offer its employees transfers to other employment positions or suspending or discharging any of its employees or otherwise discriminating against them because of their membership in, sympathies for or activities on behalf of Amalgamated Meat Cutters and Butcher Workmen of North

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[25] Employee Arden Vestal enjoyed a three week period (July 6-26) to decide if he wanted the backsaw job.

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

America, AFL-CIO, Local P-46, herein called the Union, or any other labor organization.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Richard L. Thomas immediate and full reinstatement to his former job and to the position of backsaw operator or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the unlawful discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this recommended Order.

(c) Post at their offices copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the

[27] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Regional Director for Region 1, after being duly signed by Respondents' representatives, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said Notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 18, in writing, within 20 days of this Order, what steps Respondent has taken to comply herewith.

It Is Further Ordered that any alleged unfair labor practice not specifically found herein shall be dismissed.

Dated, Washington, D. C.

ROBERT W. LEINER
Administrative Law Judge

NOTICE TO EMPLOYEES

Posted by order of the National Labor Relations Board
An agency of the United States Government

WE WILL NOT discourage membership in a labor organization by failing or refusing to offer to our employees transfers to other employment positions, or suspending or discharging any of our employees, or otherwise discriminating against them because of their membership in, sympathies for, or activities on behalf of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL P-46, herein called the Union, or any other labor organization.

WE WILL NOT in any other manner, interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL offer to Richard L. Thomas reinstatement to his former position and to the position of backsaw operator or, if those positions no longer exist to substantially equivalent positions, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our unlawful discrimination against him, together with interest at the rate of 6 percent per annum.

TAMA MEAT PACKING CORP.

.....
(Employer)

Dated ..... by .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 316 Federal Building, 110 South 4th Street, Minneapolis, Minnesota 55401, Telephone (612) 725-2615.

Supreme Court, U. S.
FILED
DEC 1 1978
MICHAEL RODAK, JR., CLERK

No. 78-542

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAMA MEAT PACKING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-4) is reported at 575 F. 2d 661. The decision and order of the National Labor Relations Board (Pet. App. A-9 to A-10) are reported at 230 N.L.R.B. 116.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-5 to A-8) was filed on July 5, 1978. The petition

for a writ of certiorari was filed on September 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by failing to transfer employee Richard Thomas to the position of backsaw operator, and by thereafter suspending and discharging him because of his union activities.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), is set forth in pertinent part at Pet. 3.

STATEMENT

1. Richard Thomas became petitioner's employee in 1971 and began work on its meat processing line. In 1975 Thomas initiated an organizational campaign on behalf of the Amalgamated Meat Cutters and Butcher Workmen of North America ("the Union"). He solicited other employees to sign authorization cards, wrote a letter to fellow employees urging them to vote for the Union, served as an elected shop steward, and was the only employee who continued to wear his steward badge and other Union insignia after the ensuing representation election (Pet. App.

A-15; A. 109, 317-318, 393).[1] During this period, Thomas received two warning notices accusing him of spreading a false rumor and physically threatening a co-worker (Pet. App. A-14 n.2). The Board subsequently found that the accusations were untrue and the notices were issued because of Thomas' union activities, in violation of Section 8(a)(1) of the Act (see note 1, *supra*). Apart from those notices Thomas had never received any adverse comments about his performance on the job (Pet. App. A-15).

On July 1, 1976, the Company posted a notice of a job vacancy for a backsaw operator, its highest paid classification (Pet. App. A-23 to A-24). The job was posted on the day it became vacant pursuant to company practice (Pet. App. A-24). Arden Vestel, who had the highest seniority among those bidding for the

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[1] The Union lost the election. Thereafter, it filed unfair labor practice charges with the Board, alleging, *inter alia*, that the Company had committed acts of interference, restraint and coercion during the election campaign.

On August 10, 1976, the Administrative Law Judge, whose decision was upheld by the Board, issued a decision and recommended order, finding that the Company had violated Section 8(a)(1) of the Act by unlawfully giving Richard Thomas two written warnings of disciplinary action because of his union activities, by announcing an unlawful wage increase, by impressing employees with the futility of selecting the Union as their collective bargaining representative, by stating that it would not bargain with the Union, by threatening employees with loss of employment and other benefits in the event of a strike, and by unlawfully interrogating employees concerning their union sympathies (Pet. App. A-14).

"A." references are to the joint appendix in the court of appeals.

job, was selected for the position (Pet. App. A-24). Dale Albee was next in seniority but was ineligible to bid, and Thomas and Darrel Davis ranked third and fourth, respectively (Pet. App. A-25 n.7). After serving in the job for about two weeks on a trial basis, Vestel, on July 19, informed his supervisor that he did not want the job (Pet. App. A-25). However, the Company did not then post the job for bidding and Thomas received no opportunity to bid for it (Pet. App. A-25 to A-26).

That same day, July 19, Thomas was summoned to Plant Superintendent Donald Derham's office. As he entered the office, Thomas inquired, "Another one of those deals, huh?" and Derham replied, "Yes, I guess so, sit down" (Pet. App. A-29; A. 121-122).. Derham then nodded toward Industrial Relations Director Bristol, who told Thomas, "Rich, we are authorized to inform you, at this time, that you have been placed on indefinite suspension" (Pet. App. A-29; A. 122, 191). Thomas asked why he was being suspended and Bristol responded, "We have not been authorized to give you a reason at this time" (Pet. App. A-29; A. 122, 182).

The next day, July 20, Bristol sought out Foreman Stanley Sasker and Leadman Jim Kesl and questioned them about an incident that had occurred on July 16 in which Thomas had advised a fellow employee on the production line not to manually pull carcasses along the line when the automatic mechanism broke down (Pet. App. A-35). Sasker and Kesl also told Bristol about an incident that had occurred

around July 12 in which Thomas as well as several other employees had advised a sick employee, whose presence was needed to maintain production, to go home (Pet. App. A-29, A-41). Neither Sasker nor Kesl had reported the matter to their supervisors or reprimanded Thomas for it at that time (Pet. App. A-29). Bristol also obtained from his files a memorandum noting that another employee had accused Thomas of calling him obscene names (Pet. App. A-31, A-43). Bristol did not question Thomas during this investigation (Pet. App. A-52; A. 182-183).

On July 22, the Company sent Thomas a letter, signed by Foreman Sasker, which stated, *inter alia* (Pet. App. A-30):

> During the past week of July 12-16, 1976 you told a fellow employee not to move the cattle ahead to fill the chain, causing a slow down in production. You also convinced another employee to go home sick after he had indicated to his supervisor he would work out the day. You also have been guilty of disruptive conduct by addressing derogatory remarks to other employees. This behavior cannot be condoned. You are hereby discharged immediately.

On July 26, Supervisor Rutledge called employee Vestal to his office and had him sign a statement that he was rejecting the backsaw job as of that date (Pet. App. A-24, A-26; A. 150). That same day, the Company assigned the backsaw job to Davis (Pet. App. A-26; A. 243-245).

2. The Board, adopting the decision of the Administrative Law Judge, found that the reasons stated in the July 22 letter for discharging Thomas were pretextual and concluded that petitioner denied Thomas a transfer to the higher rated job, and thereafter suspended and discharged him, because of his adherence to the Union (Pet. App. A-43 to A-53).

As to the name-calling incident, the Board noted that petitioner had admitted that the incident was not a ground for discharge, but only "an aggravating circumstance," that no action was taken at the time the incident occurred, and that there was admittedly "longstanding and widespread name calling throughout the plant" (Pet. App. A-43 to A-44, A-31). As to the incident in which Thomas advised a fellow employee who was sick to go home, the Board noted that other employees "said the same thing to [the sick employee] in front of [Leadman] Kesl at the same time and received no discipline whatever from [the Company] on account of such suggestions much less discharge as was the case with Thomas" (Pet. App. A-47, A-41). Concerning the incident in which Thomas advised an employee not to pull carcasses manually, the Board pointed out that similar remarks of two other employees that also could have led to a slowdown in production were not even reported to management (Pet. App. A-48 to A-49). The Board also noted that petitioner's failure to react significantly to Thomas' asserted misconduct when it occurred cast further doubt on its contention "that the

misconduct was substantial enough to form the basis of suspension and later discharge" (Pet. App. A-49).

The Board also took into consideration petitioner's refusal to give Thomas any explanation for his suspension and its failure to question him during the investigation which led to his discharge (Pet. App. A-51 to A-52). Finally, the Board took into account petitioner's previous unfair labor practices, particularly those directed at Thomas as a result of his union activities. The Board acknowledged, however, that "such evidence [is] by no means * * * dispositive." (Pet. App. A-47).

3. The court of appeals upheld the Board's decision and enforced its reinstatement order with one minor modification not pertinent here.[2] The court concluded that the record amply supported the Board's finding that petitioner suspended, discharged and refused to transfer Thomas to a higher rated job because of his union activities. The court relied on a number of specific factors: petitioner's prior unfair labor practices; Thomas' continuous union activities and participation in filing unfair labor practice charges; Thomas' excellent work record and the absence of any prior reprimand for deficiencies in his work or attendance; petitioner's failure to give Thomas any reason for his suspension; the insubstantial nature of the incidents cited as reasons for his

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[2] The court found that the backsaw operator's vacancy did not occur until a few days after July 19 and that backpay at the higher rate should date from that time (Pet. App. A-3 to A-4).

discharge (one of the incidents involving conduct in which other employees had engaged but were not reprimanded or suspended); the fact that no complaint was made to Thomas when the incidents occurred; and petitioner's failure to question Thomas during the course of its investigation (Pet. App. A-2 to A-3).

In response to petitioner's assertion that the Board's order was based solely on its prior unfair labor practice findings, the court stated (Pet. App. A-3):

> * * * an adjudication of bad faith on an earlier occasion is not alone substantial evidence of bad faith to support the Board's finding of animosity towards the union. Here, the prior adjudication does not stand alone; it is strongly supported by the other factors cited. In such circumstances, the prior adjudication can be used as evidence of present hostility. *N.L.R.B.* v. *Clinton Packing Co., Inc.*, 468 F.2d 953 (8th Cir. 1972).

ARGUMENT

The question that petitioner raises for review (Pet. 2)—whether a violation of the Act may be sustained where there is "credited evidence of lawfulness of [the Company's] motive and conduct, and the evidence of unlawful intent is derived *solely* from the findings of improper motive adduced in a previous and unrelated unfair labor practice proceeding"—is not presented on this record. The Board did not credit the Company's assertion of a lawful motive. Moreover, both the Board and the court of appeals expressly relied on evidence in addition to the previous

unfair labor practices in determining that the Company's action against Thomas was unlawfully motivated. Thus, the only issue presented here is whether substantial evidence supports the Board's findings of unlawful motivation. That question presents no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951); *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23. In any event, as shown on pages 2-5, *supra*, the record amply supports the Board's finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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